UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

[redacted],	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	**Case No. #:##-cv-#####-GCS**
[redacted],	)	
	)	
Defendant.	)	
	)	

MEMORANDUM & ORDER

SISON, Magistrate Judge:

Before the Court is Plaintiff's Motion for Leave to File an Amended Complaint. (Doc. 24). On March 15, 2022, Plaintiff filed an initial Complaint alleging that Defendant [redacted] was deliberately indifferent to his serious medical needs in violation of the Eighth Amendment (Doc. 1, p. 6). Plaintiff only sought monetary and injunctive relief against Defendant [redacted] in his individual capacity. *Id.*; (Doc. 8, p. 3). On August 11, 2022, Plaintiff subsequently filed the Motion for Leave to File an Amended Complaint. (Doc. 23). In the Proposed Amended Complaint, Plaintiff seeks to pursue claims against Defendant [redacted] in both "his individual and official capacity" so that he may acquire both monetary and injunctive reliefs. *Id*. On August 25, 2022, Defendant filed a Motion Opposing Plaintiff's Motion for Leave to File an Amended Complaint. (Doc. 25). For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff's Motion for Leave to File an Amended Complaint.

LEGAL STANDARDS

Federal Rule of Civil Procedure 15(a)(1) provides that "a party may amend its pleadings once as a matter of course" within 21 days of service.[1] FED. R. CIV. PROC. 15(a)(1). In all other cases, "a party may amend its pleadings "only with opposing party's written consent or the court's leave." Fed. R. Civ. Proc. 15(a)(2). While leave should be freely given when justice so requires, a court "may deny leave to amend if the proposed amendment fails to cure the deficiencies in the original pleading." *Crestview Vill. Apartments v. U.S. Dep't of Hous. & Urb. Dev.*, 383 F.3d 552, 558 (7th Cir. 2004); *see also*, *Life Plans, Inc. v. Security Life of Denver Ins. Co.*, 800 F.3d 343, 357-358 (7th Cir. 2015) (finding that leave may be denied if there is undue delay, futility, or prejudice).

However, a pro se complaint "must be held to less stringer standards than formal pleadings drafted by lawyers," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)) (internal quotation marks omitted), because "[a]ll pleadings shall be so construed as to do substantial justice." FED. R. CIV. PROC. 8(f). Therefore, a court should provide pro se plaintiffs an opportunity to amend their complaints so long as their complaints are without "obviously incurable defects," *Zimmerman v. Bornick*, 25 F.4th 491, 494 (7th Cir. 2022), and doing so would not "unduly delay the litigation and prejudice the defendants," *Conyers v. Abitz*, 416 F.3d 580, 586 (7th Cir. 2005).

[1] "If the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under 12(b), (e) or (f), whichever is earlier." FED. R. CIV. PROC. 12(a)(1)(B).

DISCUSSION

In the Proposed Amended Complaint, Plaintiff seeks injunctive relief against Defendant [redacted] "in his official capacity." (Doc. 23, p. 1). Defendant opposes Plaintiff's proposed amendment to the Complaint because Plaintiff has not alleged that Defendant has the authority to grant the requested injunctive relief where Plaintiff is currently incarcerated. (Doc. 25, p. 2). Defendant also contends that Plaintiff has not alleged that Defendant is charged with the "final policy making authority" at the institution. *Id*. at p. 3. For government officials to be sued in their official capacity under 42 U.S.C. § 1983, they must have final policymaking authority for the governmental actor concerning the alleged constitutional violation. *See Duda v. Bd. of Educ. of Franklin Park Pub. Sch. Dist. No. 84*, 133 F.3d 1054, 1061 (7th Cir. 1998). As such, Defendant does not consent to the proposed amendment and maintains that "justice does not require the Court to permit the amendment." (Doc. 25, p. 2).

Defendant [redacted] correctly asserts that he does not have 1) the authority to grant the requested injunctive relief and 2) the final policymaking authority for the institution. Nevertheless, Plaintiff's proposed amendment should "be so construed as to do substantial justice," Fed. R. Civ. P. 8(f), because a pro se Plaintiff "must be held to less stringer standards," *Erickson*, 551 U.S. at 94. Therefore, because the pro se Plaintiff sued the incorrect Defendant in his official capacity in seeking the requested injunctive relief, justice requires the Court to freely give leave so long as the proposed amendment does not fail to cure the deficiencies. *See Crestview Vill. Apartments*, 383 F.3d at 558. Therefore, instead of Defendant [redacted], Director [redacted], in his official capacity, is the appropriate

government official to carry out the requested injunctive relief if any were to be ordered. *See Gonzales v. Feinerman*, 663 F.3d 311, 315 (7th Cir. 2011).

Here, the Court construes Plaintiff's request to seek injunctive relief to receive the required corrective surgeries for his injuries regardless of which Illinois Department of Corrections institution he is incarcerated currently or may be in the future. (Doc. 1, p. 11). Such an order would not run afoul of restrictions on prison-related injunctions in the Prison Litigation Reform Act, which requires that an injunction "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff." 18 U.S.C. § 3626(a)(1)(A). Additionally, such relief would be "narrowly drawn" and does not extend "further than necessary to correct the violation." *Id.* Because Plaintiff's requested injunctive relief is limited to the required corrective surgery, the Court finds it appropriate to add Director [redacted] to the docket as an additional Defendant, in his official capacity only, for purposes of implementing any injunctive relief that might be awarded.

In the Proposed Amended Complaint, Plaintiff also seeks monetary relief against Defendant [redacted] "in his individual capacity." (Doc. 23, p. 1). The Eleventh Amendment precludes Plaintiff from suing government officials in their official capacities for monetary damages. *See Wynn v. Southward*, 251 F.3d 588, 592 (7th Cir. 2001). The Court construes Plaintiff's motion to add "in his individual capacity" seeks to cure the deficiency in the Complaint barred by the Eleventh Amendment. *See* FED. R. CIV. PROC. 8(f). However, Plaintiff cannot sue Defendant [redacted] in his official capacity for injunctive relief not can he sue Defendant [redacted] in his individual capacity for monetary damages. Plaintiff is already suing Defendant [redacted] in his individual capacity for monetary

damages in the initial Complaint.

CONCLUSION

Accordingly, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff's Motion for Leave File an Amended Complaint. (Doc. 24). The Court **GRANTS IN PART** Plaintiff's proposed amendment to add "Director [redacted], in his official capacity" for the purposes of pursuing injunctive relief. The Court **DENIES IN PART** Plaintiff's proposed amendment to add "Dr. [redacted], in his individual capacity" as it does not cure any existing deficiencies in Plaintiff's initial Complaint.

IT IS SO ORDERED.

DATED: February 28, 2023.

_____
GILBERT C. SISON
United States Magistrate Judge

Applicant Details

First Name	**Rachel**
Last Name	**Lefkowitz**
Citizenship Status	**U. S. Citizen**
Email Address	**rel7833@nyu.edu**
Address	**Address** **Street** **8200 Langbrook Road** **City** **Springfield** **State/Territory** **Virginia** **Zip** **22152** **Country** **United States**
Contact Phone Number	**5713276863**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2021**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 24, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Review of Law and Social Change**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hertz, Randy
hertz@nyu.edu
212-998-6434
Yoshino, Kenji
kenji.yoshino@nyu.edu
212-998-6421
Liebert, Rachael
rbl258@nyu.edu
617-721-8008

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Rachel Lefkowitz
110 West 3rd Street
New York, NY, 22012

June 12, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year student at New York University School of Law, and I write to apply for a clerkship in the judge's chambers for the 2024-25 term. As I am from Virginia, I would welcome the opportunity to return home to clerk for you, especially since I have a specific interest in working in that area long-term and hope to establish professional roots there. In addition, I would welcome the opportunity to learn from your experience not only as a judge, but also as a former federal prosecutor, a career I plan to pursue.

One of my greatest strengths is persevering despite facing extreme adversity. I have a permanent physical disability that requires full-time use of a powered wheelchair and causes severe muscle weakness. Yet I am able to prevail with accommodations and by communicating with others about my needs. As chair of the Disability Allied Law Students Association, I advocate for students in the law school who have disabilities or require accommodations. In addition, as the Community Education and Accessibility Coordinator of the Review of Law and Social Change, I work with students to come up with creative solutions for their accessibility needs so that they can fully contribute to the journal. My unique personal experience of having a disability has given me a valuable perspective that I can bring to my work as a clerk.

I am enclosing my resume, a writing sample prepared for my Criminal Procedure Simulation class, law school transcript, and three letters of recommendation from NYU Law Professors Hertz, Yoshino, and Liebert. Vice Dean Randy Hertz taught my Criminal Law and Criminal Procedure Simulation class. Professor Kenji Yoshino taught my Leadership, Diversity and Inclusion Simulation course. Professor Rachael Liebert taught my lawyering class during my 1L year, and she is now the Program Manager at Sixth Amendment Center. Below please find their contact information:

Vice Dean Randy Hertz: 212-998-6434 and randy.hertz@nyu.edu
Professor Kenji Yoshino: 212-998-6421 and YoshinoK@mercury.law.nyu.edu
Professor Rachael Liebert: 617-721-8008 and rachael.liebert@6ac.org

I hope to have the opportunity to speak with you and can be reached by phone at 571-327-6863 or email at rel7833@nyu.edu. Thank you for your consideration.

Respectfully,
/s/ Rachel Lefkowitz
Rachel Lefkowitz

RACHEL E. LEFKOWITZ

(571) 327-6863
rel7833@nyu.edu

Local Address
110 West 3rd Street
New York, NY 10012

Permanent Address
8200 Langbrook Road,
Springfield, Virginia 22152

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024
Honors: *Review of Law & Social Change*, Community Education and Accessibility Coordinator
Activities: Disability Allied Law Students Association, Chair
Domestic Violence Advocacy Project, Student Volunteer
Law Women & Women of Color Collective, Member
Meltzer Center for Diversity, Inclusion, and Belonging, Student Fellowship, Fall 2023
South Asian Law Students Association, Member
Teaching Assistant for Lawyering, 2022-23

UNIVERSITY OF VIRGINIA, Charlottesville, VA
B.A. Double major in English and Women, Gender & Sexuality, *with distinction* (GPA 3.91), May 2021
Honors: Phi Beta Kappa Honors Society, Member
Commonwealth Award from Sociology Undergraduate Program, May 2020
Activities: Cavalier Daily Newspaper, Writer

EXPERIENCE

KELLEY DRYE & WARREN LLP, New York, NY
Summer Associate, Summer 2023

UNITED STATES ATTORNEY'S OFFICE, E.D.N.Y., Brooklyn, NY
Legal Extern, Fall 2022
Drafted prosecution memoranda for matters involving child pornography, smuggling goods, and Hobbs Act robbery. Prepared historical cellsite data warrant, superseding indictment, and grand jury script for a directed exam. Participated in all aspects of a witness retaliation trial, including investigating defendant's jail calls, and researching substantive and procedural issues.

MERCER COUNTY PROSECUTOR'S OFFICE, Trenton, NJ
Summer Intern, June 2022-July 2022
Conducted research regarding a post-conviction relief petition. Compiled research into cohesive legal brief in opposition to Defense Counsel's brief. Investigated facts of cases and drafted indictments listing. Composed reference guide of cases involving instances where 404(b) evidence was permitted for sexual offenses and gang affiliation.

SEXUAL ASSAULT RESOURCE AGENCY, Charlottesville, VA
Hotline Volunteer, March 2020-October 2022
Provide crisis intervention by offering caring, reliable, empathetic advice. Serve as an immediate response to survivors of sexual assault at the time the support was needed. Direct survivors to resources and possible next steps.

WORKER'S RIGHTS CLINIC, Washington, DC
Intake Volunteer, July-September 2020
Interviewed workers over the phone about their employment related issues at work. Reviewed information with experienced employment attorney and discussed legal advice and brief services assistance. Conveyed advice from attorney back to worker about possible next steps.

ADDITIONAL INFORMATION

Additional experience managing and supervising 20-30 employees who served as my personal care attendants (August 2017-March 2020). English tutor to 11–12-year-old students (March-May 2020).

Name: **Rachel E Lefkowitz**
Print Date: **05/31/2023**
Student ID: **N13259967**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Rachael B Liebert			
Criminal Law	LAW-LW 11147	4.0	B+
Instructor: Randy Hertz			
Procedure	LAW-LW 11650	5.0	A
Instructor: Arthur R Miller			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Kevin E Davis			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Claudia Angelos Jason D Williamson			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	B+
Instructor: Melissa E Murray			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Rachael B Liebert			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B
Instructor: Adam M Samaha			
Torts	LAW-LW 11275	4.0	B+
Instructor: Catherine M Sharkey			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Claudia Angelos Jason D Williamson			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Prosecution Externship - Eastern District	LAW-LW 10103	3.0	CR
Instructor: Alixandra Smith Erin Reid			
Prosecution Externship - Eastern District Seminar	LAW-LW 10355	2.0	A-
Instructor: Alixandra Smith Erin Reid			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A
Instructor: Geoffrey P Miller			
European Human Rights Law	LAW-LW 11601	2.0	A
Instructor: Helene Tigroudja			
Property	LAW-LW 11783	4.0	B+
Instructor: Cynthia L Estlund			
Leadership, Diversity, and Inclusion Seminar	LAW-LW 12449	2.0	A-
Instructor: Kenji Yoshino Gabriel Y Delabra			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	45.0	45.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Post-Conviction Simulation	LAW-LW 10675	4.0	A-
Instructor: Randy Hertz			
Examining Disability Rights and Centering Disability Justice	LAW-LW 10983	2.0	A-
Instructor: Prianka Nair			
Evidence	LAW-LW 11607	4.0	A
Instructor: Daniel J Capra			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Eric O Bravin			
Leadership, Diversity, and Inclusion Seminar	LAW-LW 12449	2.0	A-
Instructor: Kenji Yoshino Gabriel Y Delabra			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	59.0	59.0

Staff Editor - Review of Law & Social Change 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

May 15, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Rachel Lefkowitz for a clerkship.

In her first semester of law school, Rachel was in my 1L Criminal Law course. The grade she received in the course, which was a B+, was based entirely on the exam. If the grade factored in class participation, it would have been much higher. Rachel participated actively in class and came regularly to office hours sessions. Her comments in both settings were highly thoughtful.

In the spring semester of her second year, Rachel was in my "Criminal Procedure: Arraignment to Postconviction" course. The course is mostly taught in seminar-style form but there are also in-class simulation exercises that give students the opportunity to use the legal doctrines and procedural rules they're studying and to do so in role. The written work for the course consists of two papers: a memorandum of points and authorities in a simulated federal criminal case, using Federal Rule of Evidence 609(a) and federal court caselaw to argue (as prosecution or defense) whether a defendant's prior conviction is available for use in prosecutorial cross-examination of the defendant if he chooses to take the witness stand at trial; and a simulated internal memo to the head of a capital defender office, analyzing what claims can be brought in state postconviction and federal habeas corpus and how to overcome the procedural bars stemming from the prior defense lawyers' failures to preserve the issues at trial and on direct appeal.

Rachel did an excellent job in all aspects of the course, and she received a grade of A-. In the seminar-style discussions of legal doctrines and key cases, she participated actively in class and made insightful comments. In the in-class simulation exercises, she demonstrated great creativity and excellent judgment. In the written memos, she did first-rate research and used the authorities to analyze the legal, factual, and strategic issues in a comprehensive and cogent manner. She made excellent choices about which of the potentially available arguments to make and which to forego; framed her arguments in the most persuasive way; and dealt carefully and appropriately with the counter-arguments likely to be raised by the other side.

I believe that the qualities I have observed in Rachel – her intelligence; first-rate skills of researching and writing; thoughtfulness; and good judgment – would enable her to do an excellent job as a law clerk.

Sincerely,

Randy Hertz

Randy Hertz - hertz@nyu.edu - 212-998-6434

NYU | LAW

KENJI YOSHINO
Chief Justice Earl Warren Professor of Constitutional Law
Director of the Center for Diversity, Inclusion, and Belonging

School of Law
40 Washington Square South, 501
New York, New York 10012-1099

P: 212 998-6421
F: 212 995-3662

kenji.yoshino@nyu.edu

May 30, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Rachel Lefkowitz, NYU Law '24

Dear Judge Walker:

It's a particular pleasure to recommend Rachel Lefkowitz, a member of NYU School of Law's Class of 2024, for a clerkship in your chambers. I taught Rachel in a year-long seminar titled "Leadership, Diversity, and Inclusion" (LDI) in 2022-23. I therefore feel I know Rachel extremely well and feel confident giving her my highest recommendation.

The LDI class has an enrollment limited to eighteen students each year. It seeks to "boot camp" the class not only on the substance of diversity and inclusion, but also on practical skills such as writing and oral presentations. My co-instructor and I work extremely closely with each of the students.

Rachel distinguished herself in each aspect of this intense class. Her oral presentations were polished and well-researched. Her class participation was pithy and on point. She was a terrific interlocutor for her classmates, often building upon or synthesizing their comments to advance the discussion.

Rachel's most impressive contribution in the course, however, was her written work. She wrote her paper for our course on the amplification of rhetoric in the diversity and inclusion field. She was largely responding to Robin DiAngelo's book White Fragility, which we had read as a class. Students have written on this book in past iterations of the course. Rachel's approach was notably different from those of her predecessors.

First, Rachel was able to paint the book in the best possible light, making the work "the best it could be" before turning to critique it. In general, Rachel is excellent at not demonizing her intellectual or ideological opponents. Second, she was able to draw fresh and cogent analogies to the law, showing how some of the debates that DiAngelo identified popular discourse were also being fought out in the case law surrounding civil-rights statutes. Finally, the paper was extremely well written. Perhaps in part due to her undergraduate training as an English major, Rachel has an enviably smooth and readable style.

Any recommendation of Rachel that did not address her personal qualities would be incomplete. Rachel is a cheerful, determined, and passionate person. Because she has a motor disability, she uses a wheelchair and cannot raise her hand in class. I admired her matter-of-fact approach to her disability. She observed to the class in an early session that she could not raise her hand to speak and wanted to clarify that she would be breaking in from time to time. She noted that she was sharing this so that she would not appear to be rude. Where issues of disability came up in the class, she was a quiet and forceful advocate. Indeed, we ended up changing the syllabus for the course to include a book on disability rights due to comments she made in the course. I now consider this to be a permanent change in the syllabus.

I know Rachel will go far in the law. She had a challenging time interviewing with firms this fall. While she ultimately landed a position, she had many adverse experiences on the market. I admired her unflappable determination, which I know will serve her well in a clerkship and beyond. I think she will be a transformative role model in the disability space, whether she decides to make her substantive contribution there or not.

If I were you, I would not hesitate!

Sincerely,

Kenji Yoshino

Kenji Yoshino - kenji.yoshino@nyu.edu - 212-998-6421

Kenji Yoshino - kenji.yoshino@nyu.edu - 212-998-6421

SIXTH AMENDMENT CENTER
P.O. Box 15556, Boston MA 02215

Rachael Liebert
Program Manager
rbl258@nyu.edu
617-721-8008

May 23, 2023

RE: Rachel Lefkowitz, NYU Law '24

Your Honor:

Rachel Lefkowitz is an exceptional law student and will be an outstanding judicial clerk. As Rachel's professor in the first-year Lawyering Program at NYU School of Law, I had an opportunity to observe Rachel both in class and in a variety of simulations that expose students to diverse professional and interpersonal skills. Rachel is an inquisitive and self-motivated student who possess excellent critical thinking and research and writing skills, and who loves to learn for learning's sake. I write to recommend her for a clerkship in the strongest possible terms.

The Lawyering Program, a key part of the first-year JD curriculum at NYU, is a small, year-long, simulation-based course. In this course, students operate within small teams, critique each other's work, and receive detailed feedback on a range of skills, including conducting legal research and factual due diligence, drafting objective memoranda and persuasive briefs, interviewing and counseling clients, and oral advocacy.

Rachel's performance in my class was exemplary. Rachel's written work, including both her predictive memos and her persuasive briefs, reflected comprehensive research and an impressive ability to navigate subtle legal distinctions and details. Rachel entered law school as a strong writer, and quickly took to the specifics of legal analysis and writing, incorporating strong reasoning by analogy, using declarative language, and grounding her argumentation in case law. Rachel often came to office hours to discuss different approaches to structuring legal arguments, and, not satisfied with anything but the best, she routinely experimented with various structures until she found the perfect framework for a given argument.

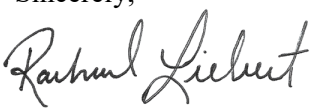
Rachel also contributed significantly to classroom discussions and simulations. As a person with a physical disability, Rachel added a unique perspective to conversations about the power of the law, and she was particularly attuned to how the law impacts individuals' lived experiences. Rachel also regularly surfaced important issues related to the role of lawyers in broader contextual dynamics, and she created a welcoming environment in which other students felt comfortable sharing their own perspectives. In our client-based simulations, Rachel demonstrated a strong ability to build rapport and empower her clients. For example,

in a simulated interview with a client who faced workplace discrimination, Rachel was able to learn more information than other students because of the bond that she formed with the client. Given Rachel's outstanding contributions to class and simulations, I selected Rachel to be a Teaching Assistant for the Lawyering Program during her second year of law school, and I know that the Lawyering Program has benefited greatly from her involvement.

On a more personal note, Rachel is a pleasure to work with and will make an excellent colleague. Rachel has always taken advantage of opportunities to meet with me one-on-one for mentorship and career advice, and I have delighted in watching her gain confidence as an aspiring lawyer and find new ways to advocate for others. Rachel is thoughtful, mature, and conscientious, and I am confident that she will thrive in the intimate setting of a judge's chambers.

If selected for a judicial clerkship, Rachel will provide excellent service to the Court, take full advantage of the learning opportunities afforded to clerks, and use her position to help elevate others whose backgrounds are, like hers, less commonly reflected in the legal profession. I recommend Rachel for a clerkship in the strongest possible terms. If I can be of any further assistance in your deliberations, please do not hesitate to contact me at rbl258@nyu.edu or 617-721-8008.

Sincerely,



Rachael Liebert

WRITING SAMPLE OF RACHEL LEFKOWITZ

NEW YORK UNIVERSITY SCHOOL OF LAW

J.D. CLASS OF 2024

[My writing sample is a memorandum of points and authorities in support of the defendant's motion *in limine* to exclude the prior conviction of willfully injuring government property. This writing sample is entirely my own work, without edits from anyone else, therefore, this draft was completed before I received any oral or written feedback from anyone.]

U.S. v. Davis
Memorandum of Points and
Authorities in Support of the
Defendant's Motion *In Limine* to
Exclude the Prior Conviction
Criminal Procedure Assignment

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF PENNSYLVANIA	
UNITED STATES OF AMERICA v. DANIEL DAVIS, Defendant	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE THE PRIOR CONVICTION No. 18,493 CRIM.

ARGUMENT

I. The court should declare defendant's prior conviction inadmissible as impeachment evidence under Rule 609(a)(1), in the event he chooses to testify at trial.

The crime that Mr. Davis was convicted of is willfully injuring government property in violation of Section 1361 of Title 18, United States Code, by breaking the latches of the doors of postal boxes set into the exterior wall of the US post office. Prior Conviction Indictment ¶¶ 1-6. The amount of damage to the said doors exceeded the sum of $1000 such that the offense was punishable by a maximum sentence of 10 years in prison. *Id*. Pursuant to the Federal Rules of Evidence, the credibility of a witness may be impeached by evidence of prior convictions if the prior conviction was for a felony. Fed. R. Evid. 609(a)(1). Here, the prior offense was punishable by more than one year of imprisonment, thus the conviction satisfies 609(a)(1). However, when the testifying witness is the defendant, the prior conviction must be admitted in a criminal trial only "if the probative value of the evidence outweighs its prejudicial effect to that defendant." Fed. R. Evid. 609(a)(1). The Third Circuit has outlined four factors to determine whether the probative value of a past conviction outweighs its prejudicial effect under Rule 609(a)(1): "(1) the kind of crime involved; (2) when the conviction occurred; (3) the importance of the witness's testimony to the case; [and] (4) the importance of the credibility of the defendant." *Gov't of V.I. v. Bedford*, 671

F.2d 758, 761 (3d Cir. 1982). The Third Circuit has held that Rule 609(a)(1) "reflects a heightened balancing test" with a "predisposition toward exclusion" and that "[a]n exception [to exclusion of the evidence] is made only where the prosecution shows that the evidence makes a tangible contribution to the evaluation of credibility and that the usual high risk of unfair prejudice is not present." *United States v. Jessamy*, 464 F. Supp. 3d 671, 675 (M.D. Pa. 2020). In the instant case, the four Bedford factors taken together weigh against admitting the prior conviction as the probative value of the evidence does not outweigh its prejudicial effect to the defendant. Therefore, the *in limine* motion to preclude the prosecution from using the defendant's prior conviction to impeach him under Rule 609(a)(1) in the event he chooses to testify at trial should be granted.

A. The first Bedford factor weighs in favor of excluding the prior conviction.

When considering the first Bedford factor regarding the kind of crime involved, "courts consider both the impeachment value of the prior conviction as well as its similarity to the charged crime." *United States v. Caldwell*, 760 F.3d 267, 286 (3d Cir. 2014). "The impeachment value relates to how probative the prior conviction is to the witness's character for truthfulness." *Id.* "When considering this factor, 'the court asks whether the past conviction involved dishonesty, false statements, or any other offense in the nature of *crimen falsi*.'" *United States v. Guerrier*, 511 F. Supp. 3d 556, 562 (M.D. Pa. 2021) (citing *Walker v. Horn*, 385 F.3d 321, 334 (3rd Cir. 2004)). The phrase "dishonesty and false statement" refers to crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully. *Cree v. Hatcher*, 969 F.2d 34, 37 (3d Cir. 1992). Crimes such as robbery, larceny, and theft have been found to reflect dishonesty on the part of the witness and are thus considered to be more probative of truthfulness. *United States v. Smith*, 2006 U.S. Dist. LEXIS 9692, at *2 (E.D. Pa. Mar. 13, 2006); *see United States v. Fromal*, 733 F. Supp. 960, 973

(E.D. Pa. 1990) ("The crime of larceny has been held in this district to involve dishonesty, as has robbery."); *Caldwell*, 760 F.3d at 286 ("[C]rimes that by their nature imply some dishonesty, such as theft, have greater impeachment value and are significantly more likely to be admissible.").

With respect to the similarity of the crime to the offense charged, the "balance tilts further toward exclusion as the offered impeachment evidence becomes more similar to the crime for which the defendant is being tried." *Caldwell*, 760 F.3d at 286. There is a heightened risk of prejudice if the witness is the defendant and the crime committed in the past is similar to the crime now charged, "'since this increases the risk that the jury will draw an impermissible inference' that the defendant committed the present offense because he or she committed the prior offense." *United States v. Dubose*, 2022 U.S. Dist. LEXIS 203026, at *20 (E.D. Pa. Nov. 8, 2022) (quoting *Caldwell*, 760 F.3d at 286).

The crime that Daniel Davis ("Mr. Davis") was convicted of is willfully injuring government property by breaking the latches of the doors of postal boxes set into the exterior wall of the US post office. Prior Conviction Indictment ¶¶ 1-4. The crime of willfully injuring government property does not by its nature imply some dishonesty, so the crime has less impeachment value, and it is less probative of truthfulness. *Caldwell*, 760 F.3d at 286. In the instant case, Mr. Davis has been charged with unlawfully taking a Social Security check from a letter box, mail receptacle, or authorized depository for mail matter, possessing the stolen check, forging the stolen check, and passing the stolen check. Pending Indictment ¶ 1-4. Additionally, in the fact pattern of the instant case, the door of the mailbox, where the check was stolen from, had been pried open and the latch was broken, which maps onto Mr. Davis's prior conviction quite closely. Davis Aff. ¶ 5. The crime of willfully injuring government property by breaking the doors of postal boxes is almost identical to the fact pattern of the current case and the prior conviction is so similar

to the offenses charged against Mr. Davis that it requires exclusion. *Caldwell*, 760 F.3d at 286. Both the prior conviction and the alleged offenses are related to postal boxes such that this similarity "increases the risk that the jury will draw an impermissible inference" that Mr. Davis committed the present offense because he committed the prior offense. *Id*. Therefore, the kind of crime involved in the prior conviction weighs in favor of excluding the conviction as there is less probative value since the crime did not have an element of deceitfulness, and the similarity of the crime to the current offenses are so similar that it will be unduly prejudicial to the defendant if the prior conviction is admitted.

B. The second Bedford factor weighs in favor of excluding the prior conviction.

The second Bedford factor refers to the age of the conviction. Older convictions tend to have a greater prejudicial effect because they have less probative value. *Dubose*, 2022 U.S. Dist. LEXIS 203026, at *20-21; *see United States v. Paige*, 464 F. Supp. 99, 100 (E.D. Pa. 1978) (holding that a longer length of time between a conviction and trial lessened its probative value). If less than ten-years have passed since the witness's conviction or release from confinement, the conviction is generally admitted because the more recent a conviction is, the more likely it affects a defendant's credibility. *United States v. Murphy*, 172 F. App'x 461, 464 (3d Cir. 2006) (holding that when only three and four years have passed since the conviction, this weighs in favor of admitting the crime); *Diaz v. Aberts*, No. 10-5939, 2013 U.S. Dist. LEXIS 74373, at *26 (E.D. Pa. May 28, 2013) (finding that defendant's prior convictions occurred within approximately the last four years, and that recency weighed in favor of admission). But even where the conviction is not subject to the ten-year restriction, "the passage of a shorter period can still reduce [a prior conviction's] probative value." *Caldwell*, 760 F.3d at 287. The age of a conviction may weigh particularly in favor of exclusion "where other circumstances combine with the passage of time to suggest a changed character." *Id*. "For example, a prior conviction may have less probative value

where the defendant-witness has maintained a spotless record since the earlier conviction or where the prior conviction was a mere youthful indiscretion." *Id.*

Mr. Davis's prior conviction occurred six and a half years ago on December 31, 2016, so it is not subject to the ten-year restriction excluding the conviction. Prior Conviction Indictment ¶¶ 1-6. However, "other circumstances combine with the passage of time to suggest a change in character" because Mr. Davis "has maintained a spotless record since the earlier conviction" six and a half years ago and the conviction occurred when he was only twenty-three years old such that "the prior conviction was a mere youthful indiscretion." *Caldwell*, 760 F.3d at 287. After Mr. Davis completed his sentence of fifteen months of probationary supervision, he was discharged from it without further incident and this conviction was his only previous brush with the law. Sentencing Agreement ¶¶ 4-6. Thus, this factor weighs in favor of excluding the prior conviction because the conviction has less probative value compared to its highly prejudicial effect.

C. The third Bedford factor weighs in favor of excluding the prior conviction.

"The third factor inquires into the importance of the defendant's testimony to his defense at trial." *Caldwell*, 760 F.3d at 287. "A defendant's decision about whether to testify may be based in part on whether his prior convictions will be admitted for impeachment purposes." *Id*. Thus, the strategical need for the defendant to testify on his or her own behalf to demonstrate the validity of their defense may weigh against the admission of a prior conviction. *Id*. "If it is apparent to the trial court that the accused must testify to refute strong prosecution evidence, then the court should consider whether, by permitting conviction impeachment, the court in effect prevents the accused from testifying." *Id.*; *Jessamy*, 464 F. Supp. 3d at 676 (noting that defendant's testimony is important in refuting the government's strong evidence, including testimony of witnesses). If the defendant's testimony may be fundamentally important to his defense, then this counts in favor of excluding the prior conviction. *Guerrier*, 511 F. Supp. 3d at 565 (observing that when the

defendant has denied that he has engaged in any of the criminal conduct with which he is presently charged and when the jury will be asked to choose between the defendant's version of events and that provided by the government witnesses, this factor weighs against admitting the conviction). "If, on the other hand, the defense can establish the subject matter of the defendant's testimony by other means, the defendant's testimony is less necessary, so a prior conviction is more likely to be admitted." *Caldwell*, 760 F.3d at 288; *see also United States v. Causey*, 9 F.3d 1341, 1344 (7th Cir. 1993) (finding that defendant "did not obviously need to testify to raise his various defenses" because several other defense witnesses provided the same testimony).

Mr. Davis maintains his innocence of all the charges and the jury will be asked to choose between Mr. Davis's version of events and that provided by the government witnesses. Davis Aff. ¶ 6. Therefore, Mr. Davis's testimony is fundamentally important to his defense. *Guerrier*, 511 F. Supp. 3d at 565. The prosecution has strong evidence against Mr. Davis, including testimony from five witnesses indicating that he stole the Social Security check on July 1, 2022, and cashed that same check on July 5, 2022. Davis Aff. ¶ 5. Vivian Vincent ("Ms. Vincent"), the complainant, will testify to the following things that happened on July 1 that led her to believe that Mr. Davis stole her check before 10 AM that day when she checked her mailbox: she heard suspicious noises coming from Mr. Davis's apartment at around 8:30 or 9 AM, Mr. Davis did not go to work by 8 AM like he usually does, and at 6 PM Mr. Davis ignored her salutation and suspiciously ran up the stairs to his apartment, at which point she remembered that she had mentioned to Mr. Davis several times before that she received Social Security. *Id*. ¶ 4. Emma Ployee, an employee of the Social Security Administration, will testify to records from her office which show that a Social Security check for $643.28 was in fact mailed to Ms. Vincent on June 29, 2022, so the disappearance of the check is not their fault. *Id*. Gordon Krantz ("Mr. Krantz"), a mail carrier

whose route includes Ms. Vincent's Street, will testify that he delivered the mail between 9:25 and 9:45 AM on July 1. *Id*. ¶ 4-5. John Nolan, an officer with the Philadelphia Police Department, will testify to the condition of Ms. Vincent's mailbox when he arrived at 10:20 AM on July 1 indicating that someone broke into the mailbox. *Id*. ¶ 5. Boris Smirnoff ("Mr. Smirnoff"), a salesclerk at a liquor store in Bensalem, Pennsylvania, will testify that he cashed Ms. Vincent's check there on the evening of July 5, from an individual named Alex Lias, whom he later identified as Mr. Davis from a police lineup. *Id*. ¶ 5-6. Bruce Springstein, the boss at the radiator plant where Mr. Davis works, will testify that Mr. Davis punched in at the time clock at 12 PM on July 1 and then punched out at 5:30 PM. *Id*. ¶ 6.

Mr. Davis is the only witness who can testify that the suspicious noises that Ms. Vincent heard at approximately 8:30 or 9 AM on July 1 came from his injured dog after the dog got hurt on their walk, the only one who can testify why he did not go to work by 8 AM on July 1 like he usually does but instead punched in at 12 PM, and the only witness who can testify to the encounter he had with Ms. Vincent at 6 PM on July 1 so as to refute his alleged suspicious behavior. *Id*. ¶ 3-4. Mr. Davis is also the only one who can refute that he tampered with the mailbox on July 1. *Id*. ¶ 5. Lastly, Mr. Davis is the only witness who can testify that he has never been to the liquor store in Bensalem where Ms. Vincent's check was cashed by Mr. Smirnoff on July 5, that he was at home alone that evening, and that nothing happened on July 5 which would give him a reason to specifically recall it. *Id*. ¶ 7. As Mr. Davis cannot establish the subject matter of his testimony by other means, his testimony is even more necessary "to refute strong prosecution evidence." *Caldwell*, 760 F.3d at 287-88. There is a greater need for Mr. Davis to testify on his own behalf to demonstrate the validity of his defense which weighs against the admission of the prior conviction. *Guerrier*, 511 F. Supp. 3d at 565.

D. The fourth Bedford factor weighs in favor of excluding the prior conviction.

The fourth and final Bedford factor concerns the significance of the defendant's credibility to the case. *Caldwell*, 760 F.3d at 288. "When the defendant's credibility is a central issue, this weighs in favor of admitting a prior conviction." *Id.*; s*ee United States v. Johnson*, 302 F.3d 139, 153 (3d Cir. 2002) (affirming the admission of a prior conviction under Rule 609(a) because the defendant's credibility was important); *United States v. Bianco*, 419 F. Supp. 507, 509 (E.D. Pa. 1976) (finding that evidence of defendant's prior convictions is relevant to attack the defendants' credibility). "Where a case is reduced to a swearing contest between witnesses, the probative value of conviction is increased." *Caldwell*, 760 F.3d at 288; *Johnson*, 302 F.3d at 152 (finding that credibility was a major issue at trial because defendant's defense depended on the jury believing his story rather than his co-defendant). Conversely, the probative value of a defendant's prior conviction may be diminished "where the witness testifies as to inconsequential matters or facts that are conclusively shown by other credible evidence." *Caldwell*, 760 F.3d at 288.

The testimony of Mr. Davis will create a "credibility contest between the defendant and the government's witnesses." *Guerrier*, 511 F. Supp. 3d at 565-66. At the preliminary examination, Mr. Smirnoff testified that Daniel Davis "looked like" the man who had presented Ms. Vincent's check under the name Alex Lias on July 5 and that Mr. Smirnoff "thought he [Mr. Davis] was the man." Davis Aff. ¶ 5. The testimony will create an issue as to whether Mr. Davis was properly identified by Mr. Smirnoff and whether Mr. Davis stole Ms. Vincent's Social Security check from her mailbox. *Guerrier*, 511 F. Supp. 3d at 566. The jury will have to decide between Mr. Davis's version of events and those provided by Mr. Smirnoff, Ms. Vincent, and the other government witnesses. *Jessamy*, 464 F. Supp. 3d at 677. In light of the choice the jury will have to make regarding credibility, Mr. Davis's conviction is likely admissible under this fourth factor.

However, the probative value of Mr. Davis's prior conviction is diminished because he plans on testifying to "inconsequential matters or facts" in support of his alibi defense "that are conclusively shown by other credible evidence." *Caldwell*, 760 F.3d at 288. Mr. Davis's alibi defense is that he had a medical emergency to take care of regarding his pet Doberman on the morning of July 1 that prevented him from being near the scene at the time when Ms. Vincent's check was stolen sometime before 10 AM when she went to check her mailbox. Davis Aff. ¶ 6. Mr. Davis plans on testifying to all of the inconsequential facts that informed his visit to the Germantown Veterinary Emergency Clinic: how his dog got hurt during their usual walk, what led Mr. Davis to seek out professional treatment, the search he conducted to find a veterinary clinic, the travel time it took to arrive at the clinic, the paperwork he had to complete, and the treatment his dog received at the clinic as well as the time that the entire process took. *Id*. ¶ 6-7. However, Mr. Davis has other witnesses and records from the Germantown Veterinary Emergency Clinic in support of his alibi defense. *Id*. ¶ 7. He has the clinic's business records showing that he brought an injured Doberman to the clinic and the dog was discharged at 10:50 AM that day. *Id*. The veterinary doctor and receptionist that day will testify that Mr. Davis was in the treatment room the entire time, the process of checking in takes a minimum of five minutes, and the suturing procedure performed by the doctor most probably would have taken longer than fifty minutes and as much as one hour and fifteen minutes. *Id*. Lastly, a licensed professional investigator who drove the six miles between Mr. Davis's apartment and the Germantown Veterinary Emergency Clinic has ascertained that the most reasonable estimate for a one-way trip given traffic conditions on a weekday morning is twenty minutes. *Id*. ¶ 8. If the procedure took an hour, the visit to the clinic from the time of discharge would have taken at a minimum an hour and twenty-five minutes, meaning he had to have left his apartment for the clinic at 9:25 AM the latest, which is before the

check was even delivered by Mr. Krantz, so Mr. Davis could not have stolen the Social Security check. *Id*. ¶ 4-5. Mr. Davis's credibility is an issue in the case which tends to weigh in favor of admitting his prior conviction. However, the inconsequential events Mr. Davis planned on testifying to in support of his alibi defense are conclusively proven by witnesses and records from the clinic, so the prior conviction loses its probative value, thus the credibility of the defendant weighs against admitting the prior conviction.

II. The court should declare defendant's prior conviction inadmissible as impeachment evidence under Rule 609(a)(2), in the event he chooses to testify at trial.

Pursuant to Rule 609(a)(2), "for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement." Fed. R. Evid. 609(a)(2). The Third Circuit has held "that a crime must involve expressive dishonesty to be admissible under Rule 609(a)(2)." *Walker*, 385 F.3d at 334. "The proper test for admissibility under Rule 609(a)(2) does not measure the severity or reprehensibility of the crime, but rather focuses on the witness's propensity for falsehood, deceit or deception." *Cree*, 969 F.2d at 38. Once the court "determines that a crime involves dishonesty or false statement, evidence of conviction of that crime *automatically* becomes admissible for impeachment purposes." *United States v. Hans*, 738 F.2d 88, 94 (3d Cir. 1984). In the present case, the operative question is whether a conviction for willfully injuring government property is a crime that involves dishonesty or false statement. Willfully injuring government property has no element that implies any form of falsehood or deception. *See* 18 U.S.C. § 1361. So, the prior conviction is inadmissible for impeachment purposes under 609(a)(2) for attacking Mr. Davis's credibility as the crime does not establish his propensity for deceit. Therefore, the *in limine* motion to exclude the defendant's prior conviction under Rule 609(a)(2) should be granted.

Applicant Details

First Name	**Benjamin**
Last Name	**Lehman**
Citizenship Status	**U. S. Citizen**
Email Address	**benjamle@umich.edu**
Address	**Address** Street **3085 Wolverine Drive** City **Ann Arbor** State/Territory **Michigan** Zip **48108**
Contact Phone Number	**734-395-0319**

Applicant Education

BA/BS From	**Cornell University**
Date of BA/BS	**May 2012**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 3, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Journal of International Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Campbell Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hershovitz, Scott
sahersh@umich.edu
734-763-4923
Cruz Bridges, Angelita
Angelita.Bridges@usdoj.gov
419-259-6376
Halberstam, Daniel
dhalber@umich.edu
734-763-4408

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a second-year law student at University of Michigan Law School, and I am writing to apply to clerk for you for the 2024-2025 term. I am interested in a federal district clerkship because after clerking, I hope to pursue a career as a government litigator, either as a federal prosecutor or on the civil side.

Prior to Law School, I worked in credit card analytics, first at Capital One, and then at Verisk Financial, an analytic consulting firm. I developed three critical skills in this work. First, I learned to tailor my presentations to the concerns and experience of my audience, adapting my material for internal technical audiences and senior executives at our clients. Second, I refined a meticulous attention to detail, because I was often the last layer of internal review before our recommendations were shared with our customers. Finally, I learned to pace myself and prioritize, working to meet my deadlines without burning out.

Developing my legal research and writing skills has been my top priority during my first two years at Michigan Law. Last Spring, I wrote a blog post for the Michigan Journal of Environmental and Administrative Law on the constitutional issues associated with agency delegation to private entities. During my Summer at the U.S. Attorney's Office, I continued to hone my legal skills, writing short memos for sentencing, opposing suppression of evidence, and defending expert testimony. In the Fall, I wrote an eighteen-page essay exploring how structural factors in governance have impeded effective regional transit in Southeast Michigan, as well as a Campbell Moot Court brief. During my Summer internship with the Department of Justice in their Tax Division, I expect to have the opportunity to develop substantive expertise, as well as to practice writing longer, more nuanced briefs.

In addition to the requested documents, I have included with my resume a letter explaining Michigan's class ranking policy.

Thank you for your consideration.
Sincerely,
Benjamin Lehman

Benjamin Lehman

3085 Wolverine Drive, Ann Arbor, MI 48108
734-395-0319 • benjamle@umich.edu
He/Him

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor 3.826 (historically top 10 %) — Expected May 2024
Journal: Managing Executive Editor, *Michigan Journal of International Law*
Honors: Certificate of Merit: Torts, Civil Procedure
Clinic: Child Advocacy Law Clinic
Activities: Treasurer, *Older Wiser Law Students*
Packet Design Team, *1L Oral Advocacy Competition*
Volunteer, *Clean Slate (Expungement) Project, Michigan Advocacy Program*

CORNELL UNIVERSITY — Ithaca, NY
Masters of Engineering in Systems Engineering — May 2013
Bachelor of Science in Civil and Environmental Engineering — May 2012
Activities: President, Ring of Steel Ithaca (Fight Choreography and Stunt Performance Troupe)
Treasurer, Risley Residential College

EXPERIENCE

DEPARTMENT OF JUSTICE, TAX DIVISION — Washington, DC
Summer Legal Intern (SLIP) — May -August 2023

UNITED STATES ATTORNEY'S OFFICE NORTHERN DISTRICT OF OHIO — Toledo, OH
Summer Legal Intern — June 2022-August 2022

- Drafted Sentencing Memos for a variety of criminal charges, including gun possession and child pornography
- Analyzed criminal history of Defendants for applicability of sentencing enhancements
- Wrote Motion to Dismiss in civil case about Rail Labor Act
- Researched and wrote responsive memoranda to Motions to Suppress and to Dismiss

VERISK ANALYTICS — White Plains, NY
Manager, Analytics — August 2018-August 2021

- Developed and presented new Powerpoint reports and analyses to help banking clients understand the impact of COVID on their partners and customers
- Scheduled team meetings and planned morale-boosting activities, both virtually and in-person
- Managed two junior associates, developing their technical, leadership, and presentational skills through practice presentations and monthly development check-ins

CAPITAL ONE FINANCIAL — Richmond, VA
Senior Data Analyst (Full Time) — August 2015-August 2018

- Coordinated shift of data to a new platform, understanding internal client needs and translating them into requirements for the tech teams to prevent any interruption in the work

Data Analyst (Full Time) — July 2013-August 2015

- Designed and created performance monitoring reports in Excel and Powerpoint for new Customer Management Products

ADDITIONAL

Languages: French (Moderate), German (Basic)
Interests: Political History, Strategy Games, Walking (5-10 miles)

MICHIGAN LAW
UNIVERSITY OF MICHIGAN

Rashida Y. Douglas
Registrar; Director
Office of Student Records, 300 Hutchins Hall
625 S. State Street, Ann Arbor, MI 48109-1215
Phone: 734.763.6499 | Fax: 734.936.1973
Email: lawrecords@umich.edu

Memo: 2018 - 2022 Class Ranking

To whom it may concern:

The University of Michigan Law School does not rank its current students; however, it does rank graduates upon completion of their degrees. As the GPAs that correspond to particular percentages do change slightly from year to year, we are providing averages for the graduating classes from the past five academic years (2018 - 2022). Thus, the following information may assist you in evaluating candidates:

-- Students with a cumulative GPA of 4.010 and above finished in the top 1%
-- Students with a cumulative GPA of 3.941 and above finished in the top 2%
-- Students with a cumulative GPA of 3.921 and above finished in the top 3%
-- Students with a cumulative GPA of 3.884 and above finished in the top 5%
-- Students with a cumulative GPA of 3.820 and above finished in the top 10%
-- Students with a cumulative GPA of 3.772 and above finished in the top 15%
-- Students with a cumulative GPA of 3.735 and above finished in the top 20%
-- Students with a cumulative GPA of 3.700 and above finished in the top 25%
-- Students with a cumulative GPA of 3.650 and above finished in the top 33%
-- Students with a cumulative GPA of 3.563 and above finished in the top 50%

During the Winter 2020 term, a global pandemic required significant changes to course delivery. All courses used mandatory Pass/Fail grading. Consequently, the students who graduated in the May 2020 term graduated with five semesters of graded courses, rather than six.

Rashida Y. Douglas
Law School Registrar & Director for the Office of Student Records

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Lehman,Benjamin
Student#: 82468771

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	510	003	Civil Procedure	Nicholas Bagley	4.00	4.00	4.00	A+
LAW	530	002	Criminal Law	Barbara Mcquade	4.00	4.00	4.00	A-
LAW	580	004	Torts	Scott Hershovitz	4.00	4.00	4.00	A+
LAW	593	011	Legal Practice Skills I	Nancy Vettorello	2.00		2.00	S
LAW	598	011	Legal Pract:Writing & Analysis	Nancy Vettorello	1.00		1.00	S
Term Total				**GPA: 4.100**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 4.100**		**12.00**	**15.00**	
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
LAW	520	003	Contracts	Kristina Daugirdas	4.00	4.00	4.00	A-
LAW	540	003	Introduction to Constitutional Law	Don Herzog	4.00	4.00	4.00	B+
LAW	594	011	Legal Practice Skills II	Nancy Vettorello	2.00		2.00	S
LAW	797	001	Model Rules and Beyond	Bob Hirshon	3.00	3.00	3.00	A
Term Total				**GPA: 3.636**	**13.00**	**11.00**	**13.00**	
Cumulative Total				**GPA: 3.878**		**23.00**	**28.00**	

Continued next page >

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Lehman,Benjamin
Student#: 82468771

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2022	**(August 29, 2022 To December 16, 2022)**							
LAW	641	001	Crim Just: Invest&Police Prac	Eve Primus	4.00	4.00	4.00	B+
LAW	664	001	European Union Law	Daniel Halberstam	3.00	3.00	3.00	A
LAW	747	001	Taxation of Individual Income	Reuven Avi-Yonah	4.00	4.00	4.00	A-
LAW	805	001	Environmental Justice	Oday Salim	2.00	2.00	2.00	A
LAW	885	007	Mini-Seminar The Enduring Allure of Book Bans	Susan Page	1.00		1.00	S
LAW	900	393	Research	Patrick Barry	1.00		1.00	S
Term Total				**GPA: 3.692**	**15.00**	**13.00**	**15.00**	
Cumulative Total				**GPA: 3.811**		**36.00**	**43.00**	
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	643	001	Crim Procedure: Bail to Post Conviction Review	Barbara Mcquade	3.00	3.00	3.00	A
LAW	669	002	Evidence	Len Niehoff	4.00	4.00	4.00	A-
LAW	886	007	Mini-Seminar II The Enduring Allure of Book Bans	Susan Page	0.00		0.00	S
LAW	910	001	Child Advocacy Clinic	Vivek Sankaran Frank Vandervort Joshua Kay	4.00		4.00	P
LAW	911	001	Child Advocacy Clinic Seminar	Vivek Sankaran Frank Vandervort Joshua Kay	3.00	3.00	3.00	A
Term Total				**GPA: 3.880**	**14.00**	**10.00**	**14.00**	
Cumulative Total				**GPA: 3.826**		**46.00**	**57.00**	

Continued next page >

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Lehman,Benjamin
Student#: 82468771

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2023	**(August 28, 2023 To December 15, 2023)**							
Elections as of:	06/06/2023							
LAW	453	001	Law and Philosophy Workshop	Ekow Yankah Sarah Moss	2.00			
LAW	657	001	Enterprise Organization	Nicholas Howson	4.00			
LAW	677	001	Federal Courts	Gil Seinfeld	4.00			
LAW	679	001	Environmental Law and Policy	Nina Mendelson	4.00			

End of Transcript
Total Number of Pages 3

This transcript is printed on special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required.

A BLACK AND WHITE TRANSCRIPT IS NOT AN ORIGINAL

UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109-1215

Scott A. Hershovitz
Thomas G. and Mabel Long Professor of Law
Professor of Philosophy
Director, Law and Ethics Program

May 29, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing in support of Benjamin Lehman's application to clerk in your chambers. Ben is an exceptional law student. He's smart, curious, and he works hard. He'll be a terrific clerk.

Lehman took my 1L torts class. And it was clear from the start that he was the top student in the class. He was sharp every time I called on him. But more than that, he asked sharp questions—questions that showed he had mastered the material and was thinking creatively about it. On a few occasions, his questions pushed my understanding of the law, and I had to consult with colleagues to find answers. I've been teaching torts for fifteen years. That doesn't happen often.

Lehman crushed the exam. He had the top score on all three sections. His raw grade was a 97; the second-highest grade was a distant 87. I can't remember a gap that large. As you might expect given that performance, his answers were exceptionally well-written. He offered a detailed analysis of every question, which aside from small details, could have served as an answer key. Indeed, I distributed Lehman's answers to students who wanted to review their exams; it was that well done.

Lehman earned an A+ in the course, of two on his transcript that semester. And he's done very well (though not quite that well) in subsequent semesters. Everything I've seen, in person and on Lehman's transcript, gives me confidence that he's got the tools to be an absolutely first-rate clerk.

Lehman is also friendly and unassuming. He's soft-spoken. He came to law school a little later than most, and approaches his work with the maturity of someone who's used to working. He'll be a delight to have in chamber, and he'll knock any assignment you give him out of the park.

If I was a judge, I'd hire Lehman in a heartbeat. I recommend him strongly.

Sincerely,

Scott A. Hershovitz

Scott Hershovitz - sahersh@umich.edu - 734-763-4923

U.S. Department of Justice

United States Attorney
Northern District of Ohio

Four Seagate, Suite 308
Toledo, Ohio 43604-2624

March 10, 2023

Dear Judge:

It is my pleasure to provide my personal and professional recommendation for Benjamin Lehman ("Ben"). I worked closely with Ben as an intern at the United States Attorney's Office for the Northern District of Ohio from June 2022 until August 2022. During that time, Ben researched and drafted substantive arguments for several criminal motions and a civil motion to dismiss an administrative appeal filed against the National Railway Adjustment Board. His written work product is excellent.

Ben is the Managing Executive Editor of the University of Michigan Journal of International Law and received a Certificate of Merit in his Torts and Civil Procedure classes. Ben's writing skills were immediately apparent while working with him. He was thorough, thoughtful, and open to suggestions as we edited multiple drafts of the motion to dismiss. He was not afraid to ask questions and get additional guidance when needed, but also took the initiative on his own to pursue legal theories and bring them to my attention.

During his time with our office, Ben was exposed to a variety of criminal cases and civil cases in the areas of affirmative and defensive litigation on behalf of the government. I am confident the experience Ben gained as a summer intern with my office, along with his high GPA and clinic experience, would make him the best candidate for a clerkship.

I highly recommend Ben Lehman for a clerkship; he is a very good writer, a hard worker, and would make a great asset to any office. Please feel free to contact me with additional questions at Angelita.Bridges@usdoj.gov or 419-259-6376.

Respectfully,

Angelita Cruz Bridges
Assistant United States Attorney

UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109-1215

Daniel H. Halberstam
Eric Stein Collegiate Professor of Law
Director, European Legal Studies

May 29, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to write in support of Benjamin Lehman, who has applied for a clerkship in your chambers. Ben is an extraordinarily sharp young lawyer with a quick analytic mind. I have no doubt he will make an excellent clerk in whatever chambers he joins.

Ben was a student in my EU class, in which we cover the constitutional structure, basic rights, and several foundational statutory provisions (such as core anti-discrimination laws) of the European Union. Our conversation often winds up being comparative, allowing students to draw on their existing knowledge of the corresponding law of the United States.

Ben stood out in our class conversations with his perceptive analysis of cases, demonstrating an extraordinary and at times astounding grasp of the material. Although he did not dominate the conversation, Ben was perhaps the single best discussant of the materials in class – indeed among the best I have seen in several years. Ben would quickly follow through obscure legal arguments, and easily recognize evasive maneuvers along the way. His spot-on critique would often make me smile.

Ben's understanding of the materials carried through on the exam, where he wrote one of the top two submissions. His writing was consistently clear, identifying hidden issues, and providing persuasive analysis of the various problems. He easily earned an A for his performance in the course.

In temperament, Ben is a rather soft-spoken person who brightens up when rigorously discussing challenging materials. He would be excellent not only at producing the written work needed from a clerk, but also at talking through the various legal arguments of a given case with his colleagues. He will surely be an asset to the chambers he joins.

In summary, I recommend Ben to you most highly and without qualification. Please do not hesitate to reach out with any questions you may have.

Yours Sincerely,

Daniel H. Halberstam

Daniel Halberstam - dhalber@umich.edu - 734-763-4408

Benjamin Lehman

3085 Wolverine Drive, Ann Arbor, MI 48108
734-395-0319 • benjamle@umich.edu

This writing sample is my portion of my first round brief for the 2022-2023 Campbell Moot Court Competition. The question we were assigned to argue was the constitutionality of Administrative Law Judges assessing punitive damages, both under the 7th Amendment and as a potential infringement of executive power. My partner wrote the 7th Amendment section, while I wrote the bulk of the introduction and conclusion, as well as the executive power section. I have removed my partner's sections, so the attached work is entirely my own and has not been edited based on feedback from anyone else, including my partner.

IN THE

Supreme Court of the United States

No. 22-0096

H. B. SUTHERLAND BANK, N.A.,
Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

BRIEF FOR RESPONDENT

24
Counsel of Record

STATEMENT OF THE CASE

A. Introduction

Petitioner Sutherland Bank (hereinafter "Petitioner") is appealing from an unfavorable 2021 Final Order in a Consumer Finance Protection Bureau (CFPB) adjudication proceeding. H. B. Sutherland Bank, N.A. v. CFPB, 505 F.4th 1, 2 (12th Cir. 2022). In support of its appeal, Petitioner puts forward two arguments. First, Petitioner argues that the damages and penalties assessed against it violated its Seventh Amendment right to a jury trial. U.S. Const. amend. VII Second, it alleges that the Bureau's use of an Administrative Law Judge (ALJ) to conduct the initial proceedings and render a Recommended Decision violates the constitutional mandate that the President take care that the laws be faithfully executed. U.S. Const. art. II § 3, cl.4. It claims that the ALJ is impermissibly insulated by two layers of for-cause removal, similar to the Oversight Board that the Court rejected in Free Enterprise Fund. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

Both of Petitioner's claims must fail. [My partner's summary of her argument on the Seventh Amendment claim was here]. The second claim also fails for three reasons. First, ALJs do not wield *executive* power, which is the type that implicates the President's ability to fulfill his mandate. Free Enter. Fund, 561 U.S. at 495. Second, the ALJ in the CFPB makes no final decisions, but "possesses purely recommendatory powers", a reason the Court explicitly gave for not extending its decision to ALJs in Free Enterprise Fund. Free Enter. Fund, 561 U.S. at 507, n.10. Lastly, the ALJ at issue in this case is not actually insulated by two layers of for-cause removal, but only one, like the Independent Counsel structure that this Court upheld in Morrison v. Olson. Morrison v. Olson, 487 U.S. 654, 686 (1988).

Since 1946, ALJs have performed their adjudicatory function subject only to removal for "good cause". Administrative Procedure Act of 1946 Pub. L. No. 79-404 §11. The current structure

of review by the Merit Systems Protection Board (MSPB) dates to 1978. Civil Service Reform Act of 1978. Pub. L. No. 95-454 §202. Petitioner asks this Court to drastically restructure the entire adjudicative process and overturn a system that has delivered efficient, impartial results for over forty years. In contrast, Respondent requests simply that this Court reaffirm the distinction that it identified in Free Enterprise Fund between policy-making executive officers and adjudicatory officials. By doing so, this Court will maintain the administrability of the regulatory system.

B. Statement of Facts

Petitioner is a nationwide bank, providing retail banking and other financial services to over 11 million customers. Sutherland, 505 F.4th at 2-3. Petitioner advertised their accounts as having no fees and told customers they were not being assessed fees. Id. at 5. However, all accounts were enrolled in Petitioner's APP service, which assesses fees for any overdraft. Id. Petitioner continued to advertise their accounts as no-fee for more than two years after the first consumer complaint about overdraft fees. Id.

In 2019, the CFPB initiated proceedings against Petitioner claiming that Petitioner's conduct violated the Electronic Fund Transfer Act (EFTA), 15 U.S.C. §§ 1693-1693r, the Consumer Finance Protection Act (CFPA), 12 U.S.C. §§ 5531(a), (d)(1), 5536(a)(1)(B), and the Fair Credit Reporting Act (FCRA) 15 U.S.C. §§ 1681-1681x. Id. at 4. Following Oral Arguments, the ALJ issued a Recommended Decision finding for the Bureau on all counts, recommending that Petitioner be held liable for over eight million dollars of damages to consumers for its violations, as well as that it be assessed civil penalties. Id. In 2020, the Thandiwe Pierson, the Director of the CFPB, issued a Final Decision, confirming the ALJ's ruling. Id. at 5.

C. Procedural History

Petitioner has consistently alleged that the CFPB violated its Seventh Amendment right to a jury trial. Id. at 2. Petitioner also claims that the Bureau's structure, under which ALJs may only

be removed for cause by a board whose members are also only removable for cause, prevents the President from taking care that the laws be faithfully executed and is therefore unconstitutional. Id. Following Director Pierson's decision, Petitioner filed a motion with the Director for a stay on the Final Order and Decision, which was denied. Id. at 5. Petitioner filed a timely petition with the 12th Circuit to set aside the Final Order and Decision. A divided panel ruled in favor of the Bureau on both counts. Id. at 5-6. Petitioner was granted a rehearing en banc by the full Circuit Court. Id. at 6. The full 12th Circuit also rejected both of Petitioner's Constitutional claims in August of 2022. Petitioner then filed a petition for writ of certiorari to the Supreme Court of the United States, which was granted.

DISCUSSION

I. CFPB ADMINISTRATIVE LAW JUDGES' FOR-CAUSE REMOVAL PROTECTIONS DO NOT IMPINGE ON THE PRESIDENT'S CAPACITY TO CONTROL THE EXECUTIVE AUTHORITY

The Supreme Court has determined that ALJs are "inferior officers" for the purposes of Article II, Section 2 of the Constitution. Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018). Under the terms of the Appointments Clause, Congress may "vest the Appointment of such inferior Officers" in, among other positions "the Courts of Law." U.S. Const. art. II § 2, cl. 2. The Constitution thus is open to inferior officers being appointed by parties outside of the executive branch, and it is in that context that the CFPB's removal system should be analyzed.

The Supreme Court has established that a "'good cause' standard for removal by itself" does not unduly impinge on executive authority. Morrison v. Olson, 487 U.S. 654, 691 (1988); U.S. v. Perkins, 116 U.S. 483, 485 (1886). In Free Enterprise Fund, however, the Supreme Court held that two levels of protected tenure could not separate "the President from an officer exercising executive power." Free Enter. Fund, 561 U.S. at 495. This ruling does not apply and should not be extended to the ALJ in this case for three reasons. First, ALJs as a general matter wield

adjudicatory power, not executive or policy-making power. Second, the ALJ in the CFPB does not exercise any kind of final decision-making power. Finally, while the establishment of good cause is determined by an independent body, the decision to remove a CFPB ALJ for cause is vested in the Commissioner, who is removable at will, so there is only one layer of good-cause removal in the system at issue.

A. Administrative Law Judges Perform an Adjudicatory, not Executive or Policy-Making Role

ALJs are fundamentally different from other executive branch officers. In contrast to the Board that was at issue in Free Enterprise Fund, ALJs neither create new rules nor do they enforce existing ones. Free Enter. Fund, 561 U.S. at 486. They "cannot initiate investigations or commence a … case." Decker Coal Co. v. Pehringer, 8 F.4th 1123, 1133 (9th Cir. 2021). Rather, they "perform only adjudicative functions" as then-judge Kavanaugh described in his dissent when Free Enterprise Fund was before the D.C. Circuit. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 699 n. 8 (D.C. Cir. 2008) (Kavanaugh J., dissenting) aff'd in part, rev'd in part and remanded, 561 U.S. 477 (2010); see also Sutherland, 505 F. 4th at 17. It is for these reasons that the Court explicitly held stated that the holding in Free Enterprise Fund "does not address …administrative law judges." Free Enter. Fund, 561 U.S. at 507 n.10.

Because ALJs are supposed to serve as "impartial adjudicators", insulating them from excessive interference by political actors is critical to maintaining the "actual and perceived integrity of [their] proceedings." Sutherland, 505 F.4th at 17; cf. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 758 (2002) (stating that "the role of the ALJ, the impartial officer designated to hear a case … is similar to that of an Article III judge.")

B. Even if some ALJs Perform an Executive Function, the CFPB ALJ Does Not Make Final Decisions, and Therefore Does Not Wield Substantial Executive Authority

The ALJs in the CFPB do not make any final decisions. Rather, they simply produce a "Recommended Decision." Petitioner in this case did file an appeal of the decision to the Director, but §1081.402 provides that even in the absence of such an appeal the Director of the CFPB will "either issue a final decision and order … , or order further briefing." 12 C.F.R. §1081.402 (2022). As Judge Kavanaugh noted, "it is logical to assume that even *for-cause* executive officers …still might be considered 'directed and supervised' if a superior other than the President has statutory authority to prevent and affirmatively command … all significant exercises of executive authority by the officer." Free Enter. Fund, 537 F.3d at 708. Since every decision made by the ALJ must be reviewed by the Director, who has full discretion to modify it, the ALJ wields no actual executive or policy-making power. This is in sharp contrast to "committing substantial executive authority" to an officer, which is what the Court struck down in Free Enterprise Fund. Free Enter. Fund,561 U.S. at 505.

The ability of the CFPB Director to perform the analysis "as if the Director had made the preliminary findings and conclusions, i.e. de novo" contrasts with the authority of the reviewing authorities in other contexts. Sutherland, 505 F.4th at 17 (internal quotations omitted). The Department of Labor's Benefits Review Boards (BRBs), who, like the CFPB director, are removable at will, "cannot reweigh the evidence" from hearings performed by ALJs, only reviewing findings of fact for "substantial evidence." Decker Coal Co., 8 F.4th at 1134. None the less, the Ninth Circuit has upheld the identical structure of ALJs subject to for-cause removal by the same protected Merit Systems Protection Board (MSPB). They did so because "ALJs are judges who make decisions that are subject to vacatur by people without tenure protection." Decker

Coal Co., 8 F.4th at 1135. The ALJ in the CFPB makes decisions that are not only subject to vacatur, but to full "de novo" review.

C. The CFPB ALJ is Only Behind One Layer of Good-Cause Removal

In Free Enterprise Fund, the Court contrasted the Attorney General as "an officer directly responsible to the president" with the Commissioners, "none of whom is subject to the President's direct control." Free Enter. Fund, 561 U.S. at 495. Like the Attorney General, the CFPB Director is directly responsible to the president and "removable at will". Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020). Like the Attorney General in Morrison, the Director of the CFPB "retains the power to remove the counsel for 'good cause,'" Morrison, 487 U.S. at 696. This contrasts with the situation the 5th Circuit faced in Jarkesy, where the SEC Commissioners who could remove the ALJ for good cause were themselves only removable for cause. Jarkesy v. SEC, 34 F.4th 446, 464 (5th Cir. 2022). The Merit Systems Protection Board (MSPB) is responsible for determining if good cause exists for taking action against an ALJ, but it is "the agency in which the administrative law judge is employed" that takes the action. 5 U.S.C. § 7521(a). It is the Director's decision, not the MSPB, whether to take action against the ALJ. The MSPB functions as an adjudicatory review board, similar to the District Court for the District of Columbia in the structure approved in Morrison. Morrison, 487 U.S. at 663. In short, because the ALJ "may be terminated for 'good cause', the Executive", through the Director, "retains ample authority" to assure that the ALJ "is competently performing his or her statutory responsibilities." Morrison, 487 U.S. at 692.

§ 7521 moves the finding of cause by an independent panel to before the agency action rather than leaving it for after-the-fact review, but this does not change the fundamental structure. In both Morrison and this case, an executive official, removable at will, may choose to terminate the inferior officer for good cause, subject to review by an independent authority. The president has more authority over the MSPB than the Article III court that performed the review in Morrison,

so this process impinges on the President's power to enforce the laws less than the Independent Counsel there. Furthermore, as discussed above, the ALJ performs a less quintessentially executive function than the Special Counsel did.

CONCLUSION

Petitioner asks this Court to dismantle a core part of our nation's regulatory apparatuses. Respondent, however, merely asks the Court to confirm two simple legal standards. First, that the Seventh Amendment right to a jury trial is not implicated by the CFPB's assessment of civil penalties. Second, that the ALJ in the CFPB is not shielded by a dual layer good-cause removal system in a way that impermissibly curtails the President's capacity to execute the laws of this country. We therefore respectfully request the Court to affirm the holding below and maintain the effective and administrable balance the democratic branches have established.

Applicant Details

First Name	**Elena**
Last Name	**LeVan**
Citizenship Status	**U. S. Citizen**
Email Address	**e.r.levan@wustl.edu**
Address	**Address** Street **1020 Union Blvd., Apt. 301** City **St. Louis** State/Territory **Missouri** Zip **63113**
Contact Phone Number	**(609) 206-9199**

Applicant Education

BA/BS From	**University of Maryland-College Park**
Date of BA/BS	**May 2020**
JD/LLB From	**Washington University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014**
Date of JD/LLB	**May 13, 2024**
Class Rank	**20%**
Law Review/ Journal	**Yes**
Journal(s)	**Washington University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Wiley Rutledge Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Osgood, Russell
rosgood@wustl.edu
D'Onfro, Danielle
donfro@wustl.edu
Crain, Marion
mgcrain@wustl.edu
314-935-3459

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Elena Ryann LeVan
1020 Union Blvd. #301, St. Louis, MO 63113
e.r.levan@wustl.edu | (609) 206-9199 | she/her

June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Albert V. Bryan United States Courthouse
401 Courthouse Square
Alexandria, VA 22314-5704

Dear Judge Walker:

I am a rising third-year student at Washington University in St. Louis where I am Senior Executive Editor of the *Washington University Law Review*, winner of the Wiley J. Rutledge Moot Court Best Brief award, and a leader of the Student Bar Association. I write to apply for a clerkship in your chambers starting in the fall of 2024 or any subsequent term. I am particularly interested in a clerkship in Virginia because of the strong personal and professional network I built throughout the DMV area during my time at the University of Maryland, College Park.

My strong background in legal research, writing, and editing would make me a valuable asset to your chambers. Working in chambers for the Honorable Audrey G. Fleissig for the Eastern District of Missouri, I researched and drafted judicial orders on a motion for summary judgment and a motion to exclude expert testimony. It was this experience that piqued my interest in clerking for a federal judge and enabled me to earn an A+ in Federal Courts. This spring, I have used the skills and knowledge I gained to support Planned Parenthood Federation of America's national litigation team and help secure healthcare access for folks across the country, focusing on research to develop emerging litigation strategy. My experiences as a copy editor and as Senior Executive Editor, the top technical editing position on the journal, have given me the skills necessary to produce consistently high-quality and detail-oriented work.

Enclosed please find my resume, official law school transcript, and writing samples. A copy of my forthcoming publication is also available upon request. The following individuals are submitting letters of recommendation and welcome inquires:

Dean Russell Osgood Washington University rosgood@wustl.edu (314) 935-4042	Professor Danielle D'Onfro Washington University donfro@wustl.edu (314) 935-6404	Professor Marion Crain Washington University mgcrain@wustl.edu (314) 935-3459

Please let me know if you are interested in additional information or materials. Thank you for your time and consideration of my application.

Respectfully,

/s/ Elena Ryann LeVan

Elena Ryann LeVan

Elena Ryann LeVan

1020 Union Blvd. #301, St. Louis, MO 63113
e.r.levan@wustl.edu | (609) 206-9199 | she/her

EDUCATION

Washington University School of Law — St. Louis, MO
Juris Doctor Candidate | GPA: 3.77 (Top 20%) — Expected May 2024

Honors: Scholar in Law Merit-Based Award
Wiley Rutledge Moot Court Competition, Semifinalist & Best Brief Award
Activities: *Washington University Law Review Vol. 101*, Senior Executive Editor
Student Bar Association, Chair of Mental Health & Wellness
Sexual Violence Prevention & Advocacy, President & Founder
Clinic: Immigration Clinic, Student Attorney Spring 2024
Instruction: Law, Gender & Justice, Instructor Fall 2023
Publication: *Fruit of the Poisonous Tree: Potential Eighth Amendment Protections for Inmates Subject to Sexual Victimization Post*-Dobbs (forthcoming WASH. U. L. REV.)

University of Maryland — College Park, MD
Bachelor of Arts in Psychology | GPA: 3.91 (Top 5%) — May 2020

Honors: Omicron Delta Kappa National Leadership Honor Society
Fulbright Award Semi-Finalist
Activities: Dean's Student Advisory Council, Chair of Academic Affairs
Student Government Association, Director of Sexual Misconduct Prevention

EXPERIENCE

Barnard Iglitzin & Lavitt LLP, Seattle, WA — Aug. — Nov. 2024
Intern. (Upcoming)

National Women's Law Center, Washington, D.C. — June — Aug. 2023
Reproductive Rights & Health Intern.

Planned Parenthood Federation of America, New York, NY — Jan. — Apr. 2023
Litigation Extern. Drafted memoranda on matters of state constitutional claims, contraceptive access under Title X, and impact of proposed legislation, among others. Conducted legal research to contribute to court filings and to advise affiliate health centers on compliance matters.

U.S. District Court for the Eastern District of Missouri, St. Louis, MO — Sept. — Dec. 2022
Judicial Extern, Honorable Audrey G. Fleissig. Drafted judicial orders, provided Bluebook edits, performed cite checks. Observed court proceedings.

Equal Employment Opportunity Commission, Washington, D.C. — May — July 2022
Enforcement Extern. Processed intake and drafted charges of discrimination based on federal anti-discrimination law. Drafted and reviewed information requests to issue recommendations on Agency findings. Drafted conciliation agreement in multi-party sexual harassment case.

Student Legal Aid Office, College Park, MD — Aug. — Dec. 2018
Legal Intern. Conducted client intake and presented cases to attorney. Maintained client records.

ADDITIONAL WORK & VOLUNTEER WORK & INTERESTS

Additional Work Experience: 1L Skills Course Instructor; Project 440 (Development Coordinator)
The Diamondback (Copy Editor); Communications Assistant (University of Maryland)
Current Volunteer Work: YWCA Sexual Assault Response Team; Culture of Respect Leadership Team
Interests: cycling, reading fiction, good coffee, Philadelphia sports, and my two cats

ISSUED IN ACCORDANCE WITH THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974. THIS CONFIDENTIAL RECORD SHOULD NOT BE RELEASED TO ANY THIRD PARTY

A BLACK AND WHITE DOCUMENT IS NOT OFFICIAL

A SECURITY STATEMENT APPEARS WHEN PHOTOCOPIED

Washington University in St. Louis

Office of the University Registrar

Record Of: **LeVan, Elena Ryann**
Student ID Number: 502959
Date Of Birth: 12/29/1998

Current Programs Of Study:
JURIS DOCTOR
CERTIFICATE IN PUBLIC INTEREST LAW

Transcript Issued 06/02/2023 To:

RECIPIENT AS DESIGNATED BY STUDENT

Fall Semester 2021

LEGAL RESEARCH METHODOLOGIES I	LAW	W74 500D	0	CIP
LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (SHIELDS)	LAW	W74 500K	2.0	A
PROPERTY (D'ONFRO)	LAW	W74 507X	4.0	A
TORTS (NORWOOD)	LAW	W74 515F	4.0	A-
CONSTITUTIONAL LAW I (OSGOOD)	LAW	W74 520C	4.0	A-

Enrolled Units 14.0 Semester GPA 3.75 Cumulative Units 14.0 Cumulative GPA 3.75

Spring Semester 2022

LEGAL RESEARCH METHODOLOGIES II	LAW	W74 500E	1.0	P
LEGAL PRACTICE II: ADVOCACY (SHIELDS)	LAW	W74 500L	2.0	A-
CONTRACTS (SHILL)	LAW	W74 501K	4.0	A-
CRIMINAL LAW (KAUFMAN)	LAW	W74 502V	4.0	A
NEGOTIATION (HOLLANDER-BLUMOFF)	LAW	W74 503C	1.0	CR
CIVIL PROCEDURE (LEVIN)	LAW	W74 506	4.0	A-

Enrolled Units 16.0 Semester GPA 3.72 Cumulative Units 30.0 Cumulative GPA 3.73

Fall Semester 2022

THE POLITICS OF REPRODUCTION	INTER D	I50 510	1.5	AUD
ADVANCED NEGOTIATION THEORY AND PRACTICE (HOLLANDER-BLUMOFF)	LAW	W74 578E	2.0	A-
EMPLOYMENT LAW (CRAIN)	LAW	W74 613C	3.0	A
FEDERAL COURTS (HOLLANDER-BLUMOFF)	LAW	W74 634G	4.0	A+
JUDICIAL CLERKSHIP EXTERNSHIP	LAW	W74 654E	3.0	CR
MOOT COURT (WILEY RUTLEDGE MOOT COURT COMPETITION)	LAW	W75 604S	1.0	CR
LAW REVIEW	LAW	W77 600S	1.0	CR

Enrolled Units 15.5 Semester GPA 3.89 Cumulative Units 44.0 Cumulative GPA 3.77

Spring Semester 2023

LABOR LAW (CRAIN)	LAW	W74 557D	3.0	A
SEMESTER IN PRACTICE EXTERNSHIP	LAW	W74 668K	8.0	CR
REGULATING SEX: HISTORICAL AND CULTURAL ENCOUNTERS (APPLETON)	LAW	W74 784	2.0	A
SPECIAL TOPICS IN REPRODUCTIVE JUSTICE: THE ABORTION RIGHT	LAW	W74 816A	1.0	A
LAW REVIEW	LAW	W77 600S	1.0	CR

Enrolled Units 15.0 Semester GPA 3.79 Cumulative Units 59.0 Cumulative GPA 3.77

Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE

Washington University in St. Louis
SCHOOL OF LAW

November 21, 2022

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Recommendation for Elena LeVan

Dear Judge Walker:

It is my pleasure to recommend Elena LeVan to you for a clerkship in your chambers. Elena is in her second year here at Washington University School of Law where I am the Dean and a Professor of Law. Before coming to Washington University, I was the President of Grinnell College (1998-2010) and, before that, the Dean (1988-1998) and a faculty member (1980-1998) at Cornell Law School in Ithaca, New York.

I first got to know Elena in the fall of 2021 when I had her as a student in our basic Constitutional Law course (structure and functions). Elena was a capable contributor to class discussions. She wrote an excellent mid-semester paper on Title IX. Her final exam was definitely of high quality, well-written and intelligent. She received a final grade of A- in the course. After the end of the first semester, I appointed her to serve as the sole student on a search committee for the director of the Law Library. The other members told me she was terrific.

Elena would interact well with others in chambers; she is friendly and diligent. She listens well and is a good researcher. I would be happy to talk with you or anyone in your chambers about Elena and her interest in being a clerk (Cell #: 641-821-3712).

Best,

/s/

Russell K. Osgood
Dean
Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Washington University in St. Louis
SCHOOL OF LAW

February 9, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Recommendation for Elena LeVan

Dear Judge Walker:

I am writing to recommend my student, Elena LeVan, for a clerkship in your chambers. I have had the pleasure of working with Elena both as a student and as a committee member on a search committee. In both capacities she has consistently been clever, detail-oriented, and mature. I believe she will make an excellent clerk.

I first met Elena when he was a student in my 1L Property class. There, in lieu of a midterm, I have students write a research memorandum that requires them to slog through various public land records systems to complete a problem set. Unlike Westlaw and Lexis, these records are not user-friendly. Elena persevered, marshalling facts from different primary sources to write a precise and well-organized memorandum. Based on this assignment, I believe that she is well equipped to handle cases with messy records and those to which there are no easy answers. In class and in office hours, Elena demonstrated a real interest in the law. On her exam, I was particularly impressed with how she nimbly assembled equitable remedies to formulate a practical solution to a multiparty problem.

In August 2022, Elena joined the committee searching for the new director of WashU's law library. Her role was to both participate in the interview process along with the other committee members and to advocate for students' concerns as the law school rethought the job description. She was unafraid of hard conversations and able to defend her positions nimbly but respectfully even when getting pushback from faculty. This was a confidential search and she handled that with diligence and care. I would welcome the opportunity to work with her again.

Finally, Elena is a delightful student. She is emotionally mature, organized, and interesting to talk with. I am confident that she is going to be an excellent attorney.

Please do not hesitate to be in touch if you have any questions.

Best,

/s/

Danielle D'Onfro
Associate Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Washington University in St. Louis
SCHOOL OF LAW

February 9, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Recommendation for Elena LeVan

Dear Judge Walker:

I am writing to recommend my student, Elena LeVan, for a clerkship in your chambers. I have had the pleasure of working with Elena both as a student and as a committee member on a search committee. In both capacities she has consistently been clever, detail-oriented, and mature. I believe she will make an excellent clerk.

I first met Elena when he was a student in my 1L Property class. There, in lieu of a midterm, I have students write a research memorandum that requires them to slog through various public land records systems to complete a problem set. Unlike Westlaw and Lexis, these records are not user-friendly. Elena persevered, marshalling facts from different primary sources to write a precise and well-organized memorandum. Based on this assignment, I believe that she is well equipped to handle cases with messy records and those to which there are no easy answers. In class and in office hours, Elena demonstrated a real interest in the law. On her exam, I was particularly impressed with how she nimbly assembled equitable remedies to formulate a practical solution to a multiparty problem.

In August 2022, Elena joined the committee searching for the new director of WashU's law library. Her role was to both participate in the interview process along with the other committee members and to advocate for students' concerns as the law school rethought the job description. She was unafraid of hard conversations and able to defend her positions nimbly but respectfully even when getting pushback from faculty. This was a confidential search and she handled that with diligence and care. I would welcome the opportunity to work with her again.

Finally, Elena is a delightful student. She is emotionally mature, organized, and interesting to talk with. I am confident that she is going to be an excellent attorney.

Please do not hesitate to be in touch if you have any questions.

Best,

/s/

Danielle D'Onfro
Associate Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Elena Ryann LeVan
1020 Union Blvd. #301, St. Louis, MO 63113
e.r.levan@wustl.edu | (609) 206-9199 | she/her

Writing Sample

The following writing sample is an excerpt of my brief which won the "Golden Quill Award" for Best Brief in the 2023 Wiley J. Rutledge Moot Court Competition. This is the half of the argument section for which I was responsible and it is original work in its original form. The full brief is available upon request.

Factual Background: The competition prompt involved a football coach at a public high school who kneeled and recited the Lord's Prayer in the locker room in front of players before every football game (a factual variation on Kennedy v. Bremerton School District*, 597 U.S. __ (2022)). Plaintiff Maureen Moxon brought action on behalf of her minor son, K.M., who was a football player. K.M. kneeled, but did not recite the prayer, when it was said before the first two football games. He asked the coach to stop leading the prayers, but he did not do so. After the first two games, K.M. stopped kneeling. K.M.'s coach told him it would be "better for team unity" if he participated. His teammates asked him why he was not kneeling and asked if he was a "heathen." The district court found that Moxon had standing to sue and that the school district violated the Establishment Clause; the circuit court reversed, finding that Moxon did have standing, but that the District did not violate the Establishment Clause.*

This brief addresses the first question certified on petition for writ of certiorari: whether the parent of a student who refuses to participate in a prayer led by an on-duty public school employee has standing, as next friend of her child, to assert a violation of the Establishment Clause.

Additional writing samples are available upon request.

ARGUMENT

I. MOXON HAS STANDING TO ASSERT AN ESTABLISHMENT CLAUSE VIOLATION AS NEXT FRIEND TO HER INJURED CHILD

Article III of the U.S. Constitution extends the jurisdiction of federal courts to cases or controversies. U.S. Const. art. III § 2. Accordingly, when presented with a dispute, courts examine whether the party seeking relief "alleged such a personal stake in the outcome of the controversy as to assure the case presents concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962); *see also Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). Federal courts must be sufficiently limited to preserve a government system of checks and balances. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).

In order to satisfy the Article III case or controversy requirement, plaintiffs must show that they have standing to bring their claim. *Id.* at 561. Plaintiffs can establish standing by showing that they: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).[1]

K.M. has (1) suffered and continues to suffer multiple injuries in fact that are (2) traceable to Kilmer's coerced pregame prayers and the West Cannon Unified School District's ("District"'s) enablement of such prayers which (3) can be redressed by the requested injunction.

[1] There may be non-Article III prudential considerations that overlap with the three elements of standing described and met here. But, "[a] federal court's 'obligation to hear and decide cases' within its jurisdiction 'is virtually unflagging.'" *Lexmark Intern, Inc. v. Static Control Components, Inc*., 572 U.S. 118, 126 (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)) (cleaned up). Because of this unflagging obligation, "[t]he prudential-standing addendum to the Article III standing inquiry has fallen into disfavor in recent years." *United States v. JPMorgan Bank Acct. No. 8125*, 835 F.3d 1159, 1167 (9th Cir. 2016).

Further, Moxon has "next friend" standing sufficient to request such relief from this court. All three elements of standing are met.

A. K.M Suffered an Injury in Fact as a Result of Kilmer's Induced Pregame Prayers

The first element of standing, the injury in fact requirement, ensures that judicial review is limited to cases involving the rights of individuals, *Marbury v. Madison*, 5 U.S. 137, 170 (1803), whose "personal stake in the outcome" assures that the presentation of issues is "concrete[ly] adverse[]" for judicial resolution. *Baker*, 369 U.S. at 204. This concrete adversity assures a sharp presentation of the issue and zealous advocacy on both sides that allows the issue to be fully heard and litigated. *Id.* The injury in fact requirement can be broken down into two parts. The plaintiff must show that they suffered "an invasion of a legally protected interest that is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

A concrete and particularized injury is one that personally and individually affects a plaintiff (particularized) and that "actually exist[s]"—it is "real," not "abstract" (concrete). *Spokeo, Inc.*, 578 U.S. at 339-40. Importantly, the injury does not need to be tangible and may arise out of purely noneconomic injuries. *Id.* at 340; *Ass'n of Data Process. Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970). In fact, this Court has recognized "in many of [its] previous cases" that intangible injuries are concrete injuries. *Spokeo, Inc.*, 578 U.S. at 340 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993)). Beyond previously sustained injuries, risk of harm itself can satisfy the concreteness requirement. *Id.* at 341.

According to the Supreme Court, the case-or-controversy requirement that motivates standing doctrine is "grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit . . . ." *Id.* at 340-41. There are few rights considered as fundamental and traditionally worthy of protection as those promulgated in the Establishment Clause. *See Engel v. Vitale*, 370 U.S. 421, 425-30 (1962) (detailing the historical importance of the Establishment Clause from the time early colonists left England to the Founders' unwillingness to let "their privilege of praying whenever they pleased be influenced by the ballot box").

This Court said as much in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), where suit was brought in two companion cases by school children and their parents against districts that required school prayer at the beginning of the school day. Though there was disagreement in the lower courts about whether school prayer infringed on the plaintiff students' constitutional rights, the Court found that these plaintiffs had standing under the Establishment Clause, stating in a footnote:

> It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain. But the requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed. The parties here are school children and their parents, who are *directly affected* by the laws and practices against which their complaints are directed. *These interests surely suffice* to give the parties standing to complain.

Id. at 224 n.9 (emphasis added) (citations omitted).

The second component of an injury in fact, that the injury be "actual or imminent" is met where the plaintiff "has sustained or is immediately in danger of sustaining" a real and immediate direct injury. *City of L.A. v. Lyons*, 461 U.S. 95, 101-02 (1983). Cases that fail the standing requirements on this element generally are those in which it is uncertain whether the

conduct will occur or whether it will occur again. *See, e.g.*, *id.*; *United Pub. Workers of Am. (C.I.O) v. Mitchell*, 330 U.S. 75 (1947); *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.").

Here, there is no question of whether the conduct has occurred, nor whether the conduct will happen again. Coach Kilmer has continued to lead these pregame prayers and has, in fact, announced his intent to continue this coercive practice. R. at 4. The District has stated explicitly that they do not intend to stop inflicting such injuries. R. at 5. K.M. suffers injury from exposure to coercive, government-sponsored religious speech, from the stigma that is associated with his non-participation—an injury this Court has recognized as one of the most serious an individual can face.

1. K.M Suffers Injury from Kilmer's Unwelcome and Coerced Pregame Prayers. Coach Kilmer has led pregame prayers in the locker room for over two decades in his official capacity as coach during a time when players are expected (if not required) to be present. R. at 1; *cf. Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2407 (2022) (football coach "offere[d] a quiet personal prayer" after games). Kilmer monitors participation in this prayer. Meanwhile, K.M. must be present in the room. He must choose to either participate in the prayer sessions by kneeling and/or reciting the prayer, or, to not participate. Either way, his Coach and his peers have and will continue to notice. R. at 2. "It would be best for team unity if you joined in the prayer." "Why weren't you kneeling?" "Are you a heathen?"

K.M.'s participation on the football team comes with it exposure to regular incidents of government-sponsored religious speech. Coach Kilmer's overall monitoring of participation, and his specific encouragement that K.M. participate only further particularize the injury. The fact

that other players were also injured by these coercive prayers does not lessen K.M.'s injury as both a member of the team subject to the general coercion and an individual who was further subjected to specific coercion. There is nothing hypothetical about the injury. One does not need to conjecture, but to simply peruse the record for a showing that K.M. has personally suffered—and the impact does not end there.

2. K.M Suffers a Stigmatic Injury From Non-Participation in Kilmer's Public Display. A noneconomic stigmatizing injury is "one of the most serious consequences" of government discrimination and can support a plaintiff's standing if they have been personally affected by that discrimination. *Allen v. Wright*, 468 U.S. 737, 754-55 (1984). Stigmatic injuries are conferred through the "perpetuat[ion] of 'archaic and stereotypic notions' or by stigmatiz[ation] of the disfavored group as innately inferior and therefore as less worthy participants in the [] community." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

This is precisely the injury that followed from Kilmer's coerced prayers and the District's enabling of such prayers in contravention of the Establishment Clause. There is massive stigmatic harm to a minor and high school student present in the room while his peers recite a prayer (at the beckoning invitation of the head coach), particularly when the student's lack of participation can be easily observed through physical indication. Beyond K.M.'s simple exposure to the prayer, his teammates therefore can, and did, observe his nonparticipation and act upon that information. Coach Kilmer himself used his observation to encourage K.M. to participate—it would be "best" for the team. R. at 2. K.M.'s teammates used their observations to bully K.M. After all, is he a "heathen"? *Id.* These are precisely the archaic stereotypes and stigmatization that stigmatic injuries are meant to encompass. Further, this is precisely the type of injury the

Establishment Clause seeks to avoid. *See Engel* at 425-30. And that harm will not stop absent a remedy.

3. K.M Faces "Certainly Impending" Future Harm and Injury. A "certainly impending" future injury, or "substantial risk" that a harm will occur is, itself, sufficient to convey standing. *Whitmore*, 495 U.S. at 158; *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (holding that petitioners had standing to seek relief in part because they intended to continue engaging in substantially similar conduct in the future); *see also Holder v. Human. Law Project*, 561 U.S. 1 (similarly holding that petitioners had standing to seek relief because plaintiffs contended they would engage in the conduct again if found to be permissible). The injury must simply not be "too speculative for Article III purposes" so that the dispute may be sufficiently concrete for judicial resolution. *Lujan*, 504 U.S. at 564 n.2.

"Coach Kilmer has testified that he intends to continue leading his players in prayer before the games . . . and the superintendent of the District has testified that the District does not intend to take any actions to prevent Coach Kilmer from doing so." R. at 5. K.M.'s risk of harm here is by no means speculative. There is not just a substantial risk that the District will impose future harm, there is a certainty–the District and Kilmer have conceded as much themselves.

The allegation of future harm asserted here is not that K.M. may face setbacks in his valued football career because his nonparticipation in the prayer is bad for "team unity"—though that injury is distinctly possible and perhaps even probable. The allegation of future harm is that K.M. will continue to face the violations of his constitutional rights that the District has said they do not intend to stop anytime soon.

4. K.M. Also Establishes Standing as a Witness to Government-Sponsored Religious Speech. Even if this Court does not recognize the significant injuries K.M. has in fact faced,

K.M.'s general observance of the practice is sufficient even if his harm is somehow not concrete, particularized, and imminent. As noted by the district court in this case, "[s]ome injuries, including those of a constitutional dimension, may be cognizable even if they do not result in some identifiable harm that can be readily measured in damages. So too under the Court's Establishment Clause jurisprudence." R. at 5 (citations omitted) (citing *Ass'n of Data Process. Serv. Orgs., Inc.* at 153-54; *Flast*, 392 U.S. at 106). In *Flast*, taxpayers had standing to bring suit against a public school for purchasing religious textbooks under the Establishment Clause because of the "logical nexus" between their status as taxpayers and the Establishment Clause's purpose of prohibiting government taxing and spending to aid religion. 392 U.S. at 103-04.

Recently, concerns have been raised about this type of supposedly "offended observer" standing, *see Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. 2067 (2019) (Gorsuch, J., concurring) (citing *Diamond v. Charles*, 476 U.S. 54 (1986)), but that concert overlooks a key concern emphasized by the very case cited to support such conclusions:

> [S]tanding [] reflects a due regard for the autonomy of those most likely to be affected by a judicial decision. The exercise of judicial power . . . can so profoundly affect the lives, liberty, and property of those to whom it extends, that the decision to seek review must be placed in the hands of those who have a direct stake in the outcome. It is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests.

Diamond, 476 U.S. at 62 (1986) (quotations and citations omitted) (cited in *Am. Legion*, 139 S.Ct. at 2098 (Gorsuch, J., concurring)). K.M. is not merely a "concerned bystander." K.M.'s life continues to be impacted by Kilmer's coerced pregame prayers, and he cannot participate in his public school's football team without being subjected to them. K.M. has a direct stake in ensuring no such prayers continue—that much is evident whether standing is found under the traditional standing test or that authorized by *Flast*.

B. K.M.'s Injury is Traceable to Kilmer's Pregame Locker Room Prayers

The second element of standing requires that the injury be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Lujan, 504 U.S. at 560 (quoting *Simon*, 426 U.S. at 41-42).

K.M.'s exposure to the unwelcome and coerced pregame prayers are directly traceable to the actions of the District. Kilmer, in his official capacity as coach, "invites" his team of high schoolers to join in public prayer just prior to each football game by kneeling and saying the words of the prayer aloud together with the students. R. at 1-2. In accordance with this Court's pronouncement in *Monell*, Kilmer's actions are considered those of the District because they are pursuant to "a [de facto] official policy." 436 U.S. at 694. The District has a clear and longstanding de facto policy of enabling these prayers, allowing Kilmer to impose this prayer on his young team despite the numerous complaints that have been brought to the District practically since this practice began two decades ago. R. At 5.

Further, the stigma K.M. was subject to because of his nonparticipation directly cited K.M.'s nonparticipation. The classmate's taunts were not unrelated. Rather, K.M. was told that it would be "better for team unity" if he participated, asked if he was "heathen." These comments and questions are traceable to the District, through their agent, leading these prayers in violation of the Establishment Clause. R. at 5. Finally, and similarly, the District stated explicitly that it will not take any action to prevent Coach Kilmer from imposing future harm, necessitating injunctive relief from this Court. R. at 5.

C. K.M's Injury is Redressable by This Court Through the Requested Injunction

The third and final element of standing is this Court's ability to redress K.M.'s injury. *See Lujan*, 504 U.S. at 561. This requirement is met where a plaintiff's injury is "likely to be

redressed by a favorable decision." *Simon*, 426 U.S. at 38. K.M. has been, and without remedy will continue to be, subject to Kilmer and the District's violations of the Establishment Clause.

When K.M. was subjected to the pregame prayers, he courageously approached Coach Kilmer and told him that he was uncomfortable with the practice and asked that Kilmer not lead these coercive pregame prayers. R. at 2. Kilmer refused. *Id.* K.M. pushed on. He contacted the principal and the District to ask that they take action and prevent Kilmer from continuing to violate his rights under the Establishment Clause. *Id.* The District refused.

Nothing has changed. The District has made it clear that, absent an injunction, K.M. will continue to be subjected to further religious displays and associated injuries. Far from the "conjectural" threatened injury faced by some, *Lujan*, 504 U.S. at 560, the District unabashedly admits that they plan to continue their constitutional violations absent intervention from this Court. R. at 5. And there is no reason to doubt that assertion. Over the past twenty years, Kilmer has made it a regular habit to violate the Establishment Clause as an agent of the District, and the District has enabled him to do so. The District has enabled him to do so over the objections of numerous students who have submitted complaints about the practice over the past two decades—complaints that arose within just a year after the coercive pregame prayers began. R. at 1, 5.

An injunction would force the District's hand. It would legally obligate the District to ensure the District and Kilmer respect the Establishment Clause. This would put an end to the induced pregame prayers. Without the induced pregame prayers, K.M. would not face stigmatic injury for his nonparticipation, and it would eliminate the risk of future harm.

D. Maureen Moxon Has Standing as Next Friend to Vindicate Her Child's Right to Freedom from Such Imposed Prayers Under the Establishment Clause

Minors can assert violations of their constitutional rights with the assistance of a representative, Fed. R. Civ. P. 12(c), often a guardian, who will pursue the case on their behalf. *See Whitmore*, 495 U.S. at 163. An individual establishes status as a "next friend" by demonstrating that (1) the real party in interest "cannot appear on his own behalf to prosecute the action" and (2) that the "next friend" is "truly dedicated to the best interests of the person on whose behalf [s]he seeks to litigate." *Id.* The "next friend" should have "some significant relationship with the real party in interest." *Id.* at 163-64.

The District does not dispute that Moxon, who has sole custody over K.M., has standing to bring this claim for K.M.'s injury. R. at 5. Because K.M. is a minor and cannot appear himself to vindicate his rights under the Establishment Clause, his full custodial parent Maureen Moxon serves as his "next friend." There is nothing in the record to suggest that Moxon is not "truly dedicated" to her son's interest. Rather, Moxon supported K.M. in bringing the violation of her son's constitutional rights to the attention of the District, and now supports K.M. as his "next friend" to respectfully request this Court enjoins the District from any further violations.

Elena Ryann LeVan
1020 Union Blvd. #301, St. Louis, MO 63113
e.r.levan@wustl.edu | (609) 206-9199 | she/her

Writing Sample

The following writing sample is a proposed order drafted during my fall 2022 judicial externship with the Honorable Audrey G. Fleissig for the Eastern District of Missouri. This document is in its original form with no edits from the judge, clerks, or any other party. It is shared with the permission of Judge Fleissig's chambers. The sample is original work, except for the first section (four paragraphs) under the heading "Discussion" which is an edited, adapted version of language taken from the judge's prior orders.

Additional writing samples are available upon request.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NAME and NAME,	)	
Plaintiffs,	)	
vs.	)	Case No. 0:00-cv-00000-AAA
NAME, et al.,	)	
Defendants.	)	

PROPOSED MEMORANDUM AND ORDER

Plaintiffs filed this suit under 42 U.S.C. § 1983 alleging that during peaceful protest activity following the September 15, 2017 verdict in *State of Missouri v. Stockley*,[1] they were unlawfully "kettled,"[2] pepper sprayed, assaulted, and arrested. This is one of several cases arising out of St. Louis Metropolitan Police Department ("SLMPD") officers' conduct during the *Stockley* protests. The Court granted in part a motion for summary judgment filed by all of the Defendants except the City. ECF No. 141. Plaintiffs' claims now include: unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments (Count 1); violations of free speech, press, association, and assembly under the First and Fourteenth Amendments (Count 2); failure to train, discipline, and supervise, and a custom of unconstitutional seizures and using excessive force (Count 4); assault (Count 5); false arrest (Count 6); intentional and negligent

[1] In *Stockley*, the Circuit Court of the City of St. Louis acquitted police officer Jason Stockley of charges arising from the death of Anthony Lamar Smith. *State v. Stockley*, No. 16220CR02213-01 (Mo. 22nd Jud. Cir. Sep. 15, 2017).

[2] According to the complaint, "kettling" is a law enforcement tactic by which officers encircle a group of protesters without providing a means of egress.

infliction of emotional distress (Counts 9 and 10); excessive force, excluding the alleged kettling and application of zip ties too tightly (Count 12); failure to intervene in the use of excessive force (Count 13); and battery (Count 14).

Defendants seek to present expert opinion testimony regarding nationally recognized standards for policing procedures and whether Defendants here complied with those standards as they relate to Plaintiffs' claims. Plaintiffs have moved to exclude from evidence at trial the opinions, testimony, and reports of Defendants' expert. ECF No. 169. For the reasons set forth below, the motion will be granted in part and denied in part.

BACKGROUND

The City has retained Evan Donnelly, a police practices consultant with a focus on law enforcement operations, as an expert to opine on the "legal and general industry standards for policing procedures." ECF No. 170 at 8. Donnelly is an attorney and Reserve Officer with the Southington, Connecticut Police Department; he has decades of experience providing legal advice, defense, education, and trainings to law enforcement agencies across the country.

In order to arrive at his opinions, Donnelly reviewed the complaint filed in this case and those filed in the several other cases arising out of SLMPD officers' conduct during the *Stockley* protests, video and audio footage from the protest, deposition transcripts, incident reports, training documents, and the City's Civil Disobedience Response Operations Plan, among several additional documents. *See* ECF No. 170-1 at 3-5. Donnelly compiled a timeline of events and bibliography, and ultimately opined that the City complied with industry standards, SLMPD standards, and the standards set out in the Templeton Agreement in the City's issuance of dispersal warnings, "encirclement" tactics, mass arrest, and use of force.

ARGUMENTS OF THE PARTIES

Plaintiffs argue that Donnelly is unqualified to render his opinions because he has no specialized knowledge of, or experience with, "kettling," the particular crowd control method used by officers in this case, nor has he ever personally used chemical munitions. Plaintiffs further assert that Donnelly is unqualified because his research, training, and legal representation has all been on behalf of police departments; such a history, Plaintiffs argue, in conjunction with Donnelly's use of the word "we" throughout his deposition, indicates that Donnelly is testifying as a "colleague-in-arms" rather than an expert. ECF No. 170 at 3. Finally, Plaintiffs argue that Donnelly's experience as an attorney and "police advocate" would "dispose[] him to offering legal opinions . . . that would be particularly misleading to the jury." *Id.* at 6-7.

Second, Plaintiffs argue that Donnelly would confuse the jury with misstatements of law and fact based on his allegedly inaccurate conclusions about the facts as they occurred and the appropriateness of the police conduct. Relatedly, Plaintiffs assert that Donnelly's testimony is not based on sufficient facts and data, citing several times during Donnelly's deposition that he did not know the answer to a question or did not take a particular fact into consideration in the course of his analysis. Finally, Plaintiffs argue that Donnelly's methodology is unreliable because his conclusions rely on preconceived assumptions that do not satisfy the reliability requirement.

DISCUSSION

The admission of expert testimony in federal court is governed by Federal Rule of Evidence 702. *Wagner v. Hesston Corp.*, 450 F.3d 756, 758 (8th Cir. 2006). Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. This version of the rule was enacted in response to *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993), which charged trial judges with a "gatekeeping" role to exclude unhelpful and unreliable expert testimony.

Factors relevant to the reliability determination include: "(1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review or publication; (3) whether the theory or technique is generally accepted in the scientific community." *Russell v. Whirpool Corp.*, 702 F.3d 450, 456 (8th Cir. 2012) (citations omitted). Additional factors include "whether the expertise was developed for litigation or naturally flowed from the expert's research; whether the proposed expert ruled out alternative explanations; and whether the proposed expert sufficiently connected the proposed testimony with the facts of the case." *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001).

"[T]he *Daubert* reliability factors should only be relied upon to the extent that they are relevant and the district court must customize its inquiry to fit the facts of each particular case." *Shuck v. CNH Am., LLC*, 498 F.3d 868, 874 (8th Cir 2007); *see also Unrein v. Timesavers, Inc.*, 394 F.3d 1008, 1011 (8th Cir. 2005) (stating that the "evidentiary inquiry is meant to be flexible and fact specific, and a court should use, adapt, or reject *Daubert* factors as the particular case demands"). There is no single requirement for admissibility so long as the proffer indicates that the expert evidence is reliable and relevant. *Unrein*, 394 F.3d at 1011. The question is whether the expert's opinion is sufficiently grounded to be helpful to the jury. *Id.* at 1012.

Although the proponent of the expert testimony must prove its admissibility by a preponderance of the evidence, *Daubert*, 509 U.S. at 592, Rule 702, "is one of admissibility rather than exclusion." *Shuck*, 498 F.3d at 874. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Olson v. Ford Motor Co.*, 481 F.3d 619, 626 (8th Cir. 2007). Proposed expert testimony "must be supported by appropriate validation – i.e., good grounds, based on what is known"; expert "knowledge connotes more than subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590, 599 (citation omitted). But, any "doubts regarding whether an expert's testimony will be useful should generally be resolved in favor of admissibility." *Clark v. Heidrick*, 150 F.3d 912, 915 (8th Cir. 1998).

The Court finds that Donnelly's history of working with, and testifying on behalf of, police organizations does not disqualify him as a witness. However, Donnelly may not usurp the role of the Court by testifying as to legal or constitutional standards, nor may he usurp the role of the jury by endorsing Defendants' version of events as true. His testimony will be limited to fact-based context on industry standards and practices that will assist the jury in contextualizing Defendants' actions.

Characterizations of Police Conduct

Plaintiffs argue that Donnelly is unqualified to testify as an expert in this case because of his "one-sided" experience working with law enforcement agencies. Such credibility concerns may be addressed on cross-examination but do not, themselves, warrant exclusion of Donnelly's opinions. Further, Donnelly's knowledge, experience, and training are sufficient to testify as to the specific tactics involved in this case. Donnelly has an extensive background as a law enforcement officer, has advised law enforcement agencies, and has trained law enforcement

agencies and officers for several decades. Rule 702 does not require Donnelly be an expert in the particular tactics used here; it simply requires that his background is sufficient to assist the jury's understanding. *See Robinson v. GEICO Gen. Ins. Co.*, 447 F.3d 1096, 1100 (8th Cir. 2006) ("Gaps in an expert witness's qualifications or knowledge generally go to the weight of the witness's testimony, not its admissibility.") (citation omitted). Donnelly's background is sufficient to assist a jury here.

However, Plaintiffs also worry that Donnelly's background as a lawyer "disposes him to offering legal opinions . . . that would be particularly misleading to jurors." ECF No. 170 at 7. They argue that statements of law and opinions on reasonableness of police behavior would confuse the jury. The Court agrees. Already, Donnelly's report and deposition offer an array of opinions that constitute legal conclusions on the ultimate issues in this case. It is true that opinion testimony is not inadmissible "just because it embraces the ultimate issue" to be decided by the jury, F. R. Evid. 704(a), but "[i]t is well settled that an expert may not offer legal conclusions about a case." *In re Acceptance Ins. Cos. Sec. Litig.*, 423 F.3d 899, 905 (8th Cir. 2005).

In cases involving police conduct in particular, "the Eighth Circuit is clear that experts may not testify to legal conclusions like the overall reasonableness of police behavior." *McDowell v. Blankenship*, No. 4:08-CV-602, 2012 WL 13054254, at *5 (E.D. Mo. Aug. 17, 2012) (citing *Schmidt v. City of Bella Villa*, 557 F.3d 564, 570 (8th Cir. 2009) (determining that the reasonableness of police procedures is a question of law); *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995) (determining that questions of probable cause and qualified immunity are questions of law)); *see also Estes v. Moore*, 993 F.2d 161, 163 (8th Cir. 1993) (per curiam) (determining that the ultimate conclusion about the existence of probable cause is a

question of law); *Scherrer v. Bella Villa*, No. 4:07-CV-306, 2009 WL 690186, at *4 (E.D. Mo. Mar. 10, 2009) (determining that overall reasonableness of police procedures is a question of law); *Zorich v. St. Louis Cnty.*, No. 4:17-CV-1522, 2018 WL 3995689 (E.D. Mo. Aug. 21, 2018) (determining that reasonableness of police procedures under the "totality of circumstances" test in light of Fourth Amendment standards is a question of law). Such determinations are questions of law and improper subjects for expert testimony. It is the province of the court to direct the jury on such issues. *S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc*., 320 F.3d 838, 841 (8th Cir. 2003).

Donnelly's report offers opinions throughout that constitute impermissible legal conclusions regarding the reasonableness of police conduct. For example, Donnelly opines that "the mass arrest . . . was reasonable and consistent with SLMPD policy and procedure, as well as law enforcement industry training and standards" and that "[o]nce the crowd failed to comply, mass arrests were both prudent and reasonable." ECF No. 170-1 at 25. These opinions are rooted in Donnelly's descriptions of general industry standards and practice, but the descriptions are improper to the extent that they conflate general industry practices with the legal and constitutional standards. According to Donnelly, the standards he applies are designed to "encourage and assist law enforcement agencies [in] deliver[ing] law enforcement services to communities that are . . . constitutionally and legally sound" and that "ensure that police conduct remains within acceptable legal and constitutional bounds." *Id.* at 7. With such characterizations, Donnelly implies that compliance with such practices establishes that Defendants did not violate Plaintiffs' constitutional rights.

The Court is mindful that there may be some instances in which general industry practices incorporate legal and constitutional principles. "However, an expert cannot testify that

'following or failing to follow certain standards met or failed to meet the applicable legal standard,' such as the 'reasonableness' of [the Defendant officers'] actions." *Sloan v. Long*, No. 4:16-CV-86, 2018 WL1243664, at *4 (E.D. Mo. Mar. 9, 2018) (citation omitted).

Donnelly's legal conclusions cannot be saved by his report's preface that these opinions and language were "not meant to encroach upon the authority of any court or the final determination of the jury." ECF No. 170-1 at 7. Despite such disclaimers, Donnelly is still a lawyer using legal language to make conclusions of law about the ultimate issues in this case. *See Lombardo v. City of St. Louis*, No. 4:16-CV-01637, 2019 WL 414773, at *8, 10 (E.D. Mo. Feb. 1, 2019) (excluding expert testimony that constituted impermissible legal conclusions despite the expert's statement that they were "not a lawyer" and "d[id] not offer legal conclusions").

To the extent that Donnelly intends to opine on the reasonableness of the police conduct, describe legal standards, or the connection (if any) between general industry practice and legal and constitutional standards, the Court concludes that such testimony is inadmissible.

Credibility and Factual Conclusions

Plaintiffs also raise concerns that Donnelly misstates and misapplies facts in order to reach preconceived conclusions in a way that does not satisfy the reliability requirement. "[A]n expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true." *Williams v. Illinois*, 567 U.S. 50, 57 (2012). "However, there is a critical distinction between an expert testifying that a disputed fact actually occurred or that one witness is more credible than another and an expert giving an opinion based upon factual assumptions, the validity of which are for the jury to determine." *Sloan*, 2018 WL 1243664, at *4 (citation omitted). Donnelly does the former when he gives his own recitation of facts in this case.

Donnelly purports to give a "Summary of Events" in paragraphs 16 to 72 of his report. *See* ECF No. 170-1 at 8-16. This recitation of facts does not come with any disclaimer that these are the factual assumptions on which Donnelly's opinions lie. Rather, the testimony reiterates the facts as stated by the Defendants and suggests Defendants' version of events are more credible. Donnelly's factual testimony continues into the issuance of his opinions and conclusions as well. For example, Donnelly opines that "the use of four separate lines . . . that encircled the protestors and were utilized to contain the protestors who had refused to obey the dispersal orders[] met with generally accepted law enforcement industry standards." *Id.* at 19. This opinion is not only a legal conclusion, but one that rests upon an endorsement of the facts as testified to by Defendants.

It is the province of the jury to settle factual disputes. Where there are conflicting descriptions of events, rulings on expert testimony are intended to protect the "exclusive province of the jury to determine the believability of the witness. . . . An expert is not permitted to offer an opinion as to the believability or truthfulness of a [witness]'s story." *Bachman v. Leapley*, 953 F.2d 440, 441 (8th Cir. 1992) (citations omitted). In cases involving alleged police misconduct, such factual determinations include "what facts were known to the officers at the time of arrest." *Peterson*, 60 F.3d at 475.

Here, there is much dispute over the facts of the case, including what facts the officers knew or should have known at the time of Plaintiffs' arrest. That dispute must be settled by the jury. Accordingly, Donnelly may not testify as to which version of events occurred here, what facts were available to the officers at the time of their alleged misconduct, nor may he endorse the Defendants' version of events as true.

Testimony Regarding General Industry Practice and Standards

"By contrast, expert testimony on industry practice or standards is admissible." *Lombardo*, 2019 WL 414773, at *8 (citing *S. Pine Helicopters*, 320 F.3d at 841). Expert testimony is intended to "contextualize the evidence" that the jury will hear about police conduct in light of the general industry practices and standards. *Id.* at *10 (quoting *Sloan*, 2018 WL 1243664, at *3). Donnelly's testimony must be limited to opinions that will assist the jury in understanding the evidence or in determining a fact in issue. *See* Fed. R. Evid. 702.

To the extent that Donnelly intends to opine on general industry standards and practices, and whether such standards and practices were applicable here, such testimony would be admissible. Donnelly may not testify that the amount of force here was reasonable, but he may testify, for example, that "[c]hemical agents are often utilized in mass arrest situations due to the inherent danger with large, emotionally charged crowds . . . ." ECF No. 170-1 at 29. Similarly, Donnelly may apply such standards to hypothetical scenarios, including those that mirror the facts alleged by the parties in this case. *See Sloan,* 2018 WL 1243664, at *4. For example, Donnelly may be asked a question along the lines of: "[a]ssuming this set of facts, might a reasonable officer conclude or do X?" *Id.* at *4 (citation omitted). Such statements would communicate general industry standards and practices that would help contextualize the situation for the jury without making conclusions of law on behalf of the court or findings of fact on behalf of the jury. However, Donnelly may not endorse any one of the factual accounts of the events giving rise to this action, and therefore cannot reach any ultimate conclusions about the reasonableness of Defendants' conduct.

CONCLUSION

For the reasons set forth above,

IT IS HEREBY ORDERED that Plaintiffs' motion to disqualify and exclude the report and testimony of Eric Donnelly is **GRANTED in part and DENIED in part**, as set forth above. Donnelly's report and testimony will be excluded except to the extent that it provides fact-based context regarding general industry standards and practices, subject to reconsideration if drawing the distinction proves to be impracticable.

Applicant Details

First Name	**Alexandra**
Last Name	**Li**
Citizenship Status	**U. S. Citizen**
Email Address	**aml404@georgetown.edu**
Address	**Address** Street **460 New York Ave NW Unit 904** City **Washington** State/Territory **District of Columbia** Zip **20001** Country **United States**
Contact Phone Number	**9259896589**

Applicant Education

BA/BS From	**University of Illinois-Urbana-Champaign**
Date of BA/BS	**May 2017**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 1, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Appellate Advocacy Division, Barristers' Council**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**National Asian Pacific American Bar Association**

Recommenders

Teitelbaum, Joshua
jct48@law.georgetown.edu
202 661-6589
Rust-Tierney, Diann
dr967@georgetown.edu
(703) 201-1958
Nourse, Victoria
vfn@law.georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Alexandra M. Li
460 New York Ave NW, Washington, DC 20001 | (925) 989-6589 | aml404@georgetown.edu

June 8, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Jackson:

I am a rising third year student at Georgetown University Law Center and I am writing to apply for a clerkship with your chambers for the 2024-2025 term.

I am a first-generation high school, college, and expected law school graduate in my family. Growing up as a queer woman of color and a child of working-class immigrant parents equipped me with diverse perspectives, and a desire to serve marginalized communities. During my first year of law school, I volunteered at weekly clinics in homeless shelters through the Homeless Legal Assistance Project. At Cadwalader, I helped a pro bono asylum client through the naturalization process. Currently, I am serving a pro bono client seeking defensive political asylum in a removal proceeding at Davis Polk. At Georgetown, I serve on the executive board of APALSA and work to increase networking opportunities for AAPI students, many of whom are also first-generation law students. After I retire from practice, I plan to become a law professor to mentor and invest in the next generation of lawyers, especially those who are historically underrepresented in the legal profession.

I have continuously sought out opportunities to hone my legal writing and advocacy skills in law school. I was awarded Best Brief at the William E. Leahy Moot Court Competition. As a member of the Appellate Advocacy Division of Barristers' Council, I will also coach second year students representing Georgetown Law in competitions next year. I am an incoming student attorney in Georgetown's Appellate Litigation Clinic, where I intend to challenge myself in becoming a better advocate by briefing and, if warranted, arguing on behalf of pro se litigants before the Fourth, Eleventh, and D.C. Circuits. Finally, I will continue to serve as a Research Assistant to Professor Victoria Nourse, whose scholarship focuses on statutory interpretation and civil rights.

Clerking for your chambers is my ideal choice. I aspire to become a litigator specializing in complex litigation and I would love the opportunity to observe decision making in the chambers, and effective advocacy in the court room. Externing for Judge Lafferty of the Bankruptcy Court for the Norther District of California helped me realize that clerking is an excellent way to serve the public, which is an important education and career goal of mine. Finally, clerking for your chambers would create an opportunity to develop a mentor relationship with you that continues throughout my career. I believe our shared passion for the public will materialize from lessons into actions that will make me a better lawyer.

Enclosed please find my resume, a writing sample, my transcript, and my recommendations from Professors Victoria Nourse, Joshua Teitelbaum, and Diann Rust-Tierney. I look forward to hearing from you soon. Thank you for your time and consideration.

Respectfully,

Alexandra M. Li

ALEXANDRA M. LI

460 New York Ave NW, Washington, D.C. 20001 • (925) 989-6589 • aml404@georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER **Washington, DC**
Juris Doctor, GPA: 3.87 Expected May 2024
Honors: Barristers' Council Appellate Advocacy Division 2022 William E. Leahy Moot Court Competition Best Brief Award
Clinic: Appellate Litigation Clinic (Aug. 2023 – May 2024)
Activities: APALSA Executive Board, Professional Chair (Private Sector); OUTLaw; Georgetown Law Softball

ARIZONA STATE UNIVERSITY, SANDRA DAY O'CONNOR COLLEGE OF LAW **Phoenix, AZ**
First-year J.D. coursework completed, GPA: 3.98 **2021 – 2022**
Honors: CALI Award for Contracts, Willard H. Pedrick Scholar
Activities: OUTLaw, APALSA, Homeless Legal Assistance Project

UNIVERSITY OF ILLINOIS, URBANA CHAMPAIGN **Champaign, IL**
Bachelor of Science, Finance; Bachelor of Science, Information Systems & Information Technology **May 2017**
Activities: Phi Mu Fraternity, Director of Parents & Alumni Relations; Mercer, Summer Consulting Intern (2015)

EXPERIENCE

DAVIS POLK WARDWELL LLP **Washington, DC**
Summer Associate **May 2023 – Present**
- Analyzed pending criminal prosecutions of employer non-solicitation agreements as per se antitrust violations; briefed supervising associates on client's potential exposure to criminal liability.
- Researched and summarized preliminary antitrust exposure for client's pending acquisition.

GEORGETOWN UNIVERSITY LAW CENTER **Washington, DC**
Research Assistant for Victoria Nourse **Sept. 2022 - Present**
- Analyzed and compiled data for an empirical analysis of textual conflicts, textual application, and interpretive principles for Supreme Court merits opinions for the 2020 and 2021 terms.
- Researched and wrote memorandum on Title VI private right of action in higher education; analyzed potential legal attacks against affinity groups under Title VI in lieu of pending Supreme Court decisions on affirmative action.

UNITED STATES BANKRUPTCY COURT, NORTHERN DISTRICT OF CALIFORNIA **Oakland, CA**
Judicial Extern to Hon. William J. Lafferty III **July 2022 – Aug. 2022**
- Researched and penned memorandum outlining facts and legal conclusions as to whether a § 362 stay violation occurred in an adversary proceeding arising out of a dismissed Chapter 13 bankruptcy case.
- Researched and briefed Judge Lafferty on the Ninth Circuit's interpretations of Domestic Support Obligation priority under Bankruptcy Code § 507, and non-dischargeability exceptions in Chapter 13 bankruptcy cases.

CADWALADER, WICKERSHAM & TAFT LLP **Washington, DC**
Summer Associate, Diversity Fellow **May 2022 – July 2022**
- Researched and wrote memoranda on affirmative behavioral injunctive relief in antitrust tying cases, as well as second Circuit case law regarding preclusion of witness testimonies on the basis of late disclosure.
- Researched discretionary factors for asylum immigration; revised asylum letter; conducted mock naturalization interviews with pro bono client.
- Researched and drafted memorandum on potential individual liability of corporate recidivists under new Consumer Financial Protection Bureau (CFPB) leadership and policies.

CISCO MERAKI **San Francisco, CA**
Business Intelligence Analyst **Dec. 2018 – Oct. 2020**
- Conducted Request-For-Quotes (RFQs) with overseas contract manufacturers, and negotiated costs for new products.
- Created new streamlined processes for return of products that generated up to $10 million financial savings.
- Reconciled quarterly costs of 117 products with contract manufacturers and component vendors.

POST HOLDINGS, INC. **Emeryville, CA**
Master Data and ERP Business Analyst **June 2018 – Nov. 2018**
- Built codes assessing data quality within existing databases; analyzed root causes of abnormal system changes and errors.

UNIQUITY RETIREMENT + SAVINGS **San Francisco, CA**
Accountant **Feb. 2018 – June 2018**
- Assisted in financial modelling project to forecast 5-year growth; organized and presented analytical findings.

LANGUAGES AND INTERESTS

- Mandarin (proficient), Teochew (proficient), Cantonese (basic proficiency).
- Poetry, water coloring, cooking, yoga, UFC Women's Strawweight.

Arizona State University

Unofficial Transcript

Name: **Alexandra Mingsi Li**
Student ID: **1222572884**

Print Date: 06/09/2023
External Degrees
University of Illinois Urbana-Champaign
Bachelor of Science 05/01/2017

Beginning of Law Record

2021 Fall

Course	Description	Attempted	Earned	Grade	Points	
LAW 515	**Contracts**	4.000	4.000	A+	17.332	Laura Coordes
LAW 517	**Torts**	4.000	4.000	A	16.000	Abigail Jones
LAW 518	**Civil Procedure**	4.000	4.000	A	16.000	Robert Miller
LAW 519	**Legal Method and Writing**	3.000	3.000	A	12.000	Amy Langenfeld

			Attempted	Earned	Points
Term GPA:	4.09	Term Totals	15.000	15.000	61.332
Cum GPA:	4.09	Cum Totals	15.000	15.000	61.332

2022 Spring

Course	Description	Attempted	Earned	Grade	Points	
LAW 516	**Criminal Law**	3.000	3.000	A-	11.001	Erik Luna
LAW 522	**Constitutional Law**	3.000	3.000	A-	11.001	Ilan Wurman
LAW 523	**Property**	4.000	4.000	A	16.000	Karen Bradshaw
LAW 524	**Legal Advocacy**	2.000	2.000	A	8.000	Andrew Carter
LAW 638	**Professional Responsibility**	3.000	3.000	A	12.000	Abigail Jones

			Attempted	Earned	Points
Term GPA:	3.87	Term Totals	15.000	15.000	58.002
Cum GPA:	3.98	Cum Totals	30.000	30.000	119.334

END OF TRANSCRIPT

Record of: Alexandra M. Li
GUID: 841613850

Course Level: Juris Doctor

Transfer Credit:
Arizona State University
School Total: 30.00
Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R	
Fall 2022								
LAWJ	038	08	Antitrust Law: A Survey from the Sherman Act of 1890 to Today's Progressive Movement	3.00	A	12.00		
			Howard Shelanski					
LAWJ	1098	05	Complex Litigation	4.00	A-	14.68		
			Maria Glover					
LAWJ	165	02	Evidence	4.00	A-	14.68		
			Michael Pardo					
LAWJ	1777	08	Human Rights Advocacy: Lessons from the Campaign to End the Death Penalty & other Humn Rts Campaigns	2.00	A-	7.34		
			Diann Rust-Tierney					

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	48.70	3.75
Cumulative	43.00	13.00	48.70	3.75

Subj	Crs	Sec	Title	Crd	Grd	Pts	R	
Spring 2023								
LAWJ	025	05	Administrative Law	3.00	A	12.00		David Hyman
LAWJ	1107	08	Analytical Methods	3.00	A	12.00		Joshua Teitelbaum
LAWJ	1686	05	White Collar Criminal Practice: International Scandal Investigations	1.00	P	0.00		Frances DeLaurentis, Ronald Coleman
LAWJ	215	08	Constitutional Law II: Individual Rights and Liberties	4.00	A	16.00		Louis Michael Seidman
LAWJ	268	05	Remedies in Business Litigation	3.00	A	12.00		John Taurman
LAWJ	882	09	International Commercial Arbitration	1.00	P	0.00		Louis Kimmelman

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	15.00	13.00	52.00	4.00
Annual	28.00	26.00	100.70	3.87
Cumulative	58.00	26.00	100.70	3.87

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

This is a letter of recommendation for Alexandra Li in support of her application for a judicial clerkship.

I am the David Belding Professor of Law at Georgetown University Law Center. I am also Professor of Economics (by courtesy) in the Department of Economics at Georgetown University. Before coming to Georgetown, I clerked for Judge Richard M. Berman of the U.S. District Court for the Southern District of New York, practiced law at Cahill Gordon & Reindel in New York, and was a Visiting Assistant Professor at Cornell Law School. I hold a J.D. from Harvard Law School and a Ph.D. in Economics from Cornell University.

I have come to know Alexandra Li in the past six months because she was a student in my course, Analytical Methods. The objective of the course is to enhance students' ability to give sound legal advice and make effective legal arguments by introducing them to selected concepts and methods from economics and statistics that are relevant to numerous areas of law and legal practice. Grades are based on a midterm examination and a final examination. The students are also responsible for working on daily problems that we discuss together in class. This gives the students an opportunity to actively work with the course material throughout the semester, and it gives me the opportunity to see in real time how the students are doing with the material.

Alexandra was a stand-out student in the course. Her performance on the midterm and final examinations were very good, to be sure. But what made Alexandra truly stand out were her exceptionally valuable contributions to our classroom discussions. Perhaps more than any other law student that I have taught since coming to Georgetown in 2009, Alexandra consistently and formidably challenged the economic and statistical approaches to the law that I teach in Analytical Methods. Her comments and questions were intelligent and insightful and reflected a great academic curiosity for the subject matter, a trait that in my opinion characterizes the best students in any course. Her classroom interventions, and the thoughtful discussions that they often precipitated, greatly enriched the experience and learning of her fellow students—as well as my own. It was true delight to have Alexandra in my course.

Alexandra's outstanding performance in my course is hardly surprising. She is an extremely accomplished law student, having earned a near-perfect grade point average at Arizona State before transferring to Georgetown where she has continued to excel. Alexandra is clearly on a glide path to graduating from law school with distinction and becoming an excellent attorney. From what I understand, Alexandra wants to practice as a litigator after clerking, ideally doing plaintiff-side work, and has the long-term goal of becoming a law professor. I have no doubt that Alexandra will accomplish whatever professional goals she sets for herself.

At the same time, Alexandra's academic achievements are rather astonishing. She grew up in a low-income household as a daughter of immigrant parents. She is a first-generation college graduate and a queer woman of color. While Alexandra may be on a glide path to success now, she has had to overcome many disadvantages and obstacles to get on her current path.

In my personal interactions with Alexandra, including numerous conversations after class and during my office hours, I have found her to be a very personable and mature young woman. She appears to be well grounded and well adjusted to the rigors of life as a law student. I imagine that it would be very enjoyable and rewarding to have Alexandra in chambers.

In summary, based on her performance in my course, her overall academic performance in law school, and her personal qualities, I believe that Alexandra would excel as judicial clerk and I recommend her highly and without reservation.

Yours truly,

Joshua C. Teitelbaum
David Belding Professor of Law

Joshua Teitelbaum - jct48@law.georgetown.edu - 202 661-6589

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to write this letter of recommendation on behalf of Alexandra M. Li, Georgetown Law '24, who has applied to you for a clerkship. Alexandra is an excellent writer. Her high academic performance is further enhanced by the careful and insightful approach that she applies to difficult questions.

Alexandra was one of fifteen students participating in my fall 2022 seminar on human rights advocacy. During the semester, students examined a range of legal issues; policy considerations and professional ethics questions that arise in the context of the law and human rights advocacy. Because the group was small, I was able to get to know each of the students and their strengths and abilities quite well.

Alexandra asked questions in class that refined our thinking and analysis. She is a skilled researcher. In small group activities, I observed Alexandra often move discussions forward, referencing a point of law that she had researched for the group.

I was especially impressed by the sophisticated connections that Alexandra made between the topics being discussed in class and her experience in other courses and outside the classroom. For example, Alexandra shared reflections gleaned from her externship with Hon. William J. Lafferty III on the United States Bankruptcy Court for the Northern District of California. Alexandra's comments demonstrated a sophisticated understanding of the law and procedure and a practical understanding of the real-world impact of decisions being made in bankruptcy court. Her comments reflected a commitment to enhancing the quality of justice and the larger aspiration for true equality under the law.

Alexandra's final paper and class presentation were outstanding. She created a plan to provide pro bono and low bono access to counsel for individuals seeking to discharge their debts in bankruptcy court.

Her presentation and paper included a thorough discussion of the limited protection afforded to, often the most financially vulnerable people, seeking relief from the bankruptcy court. She discussed "the downstream" impact of these limited protections on the judicial system itself. Alexandra proposed a practical solution to the problem: encouraging more law schools to develop clinical programs that would provide student representation in bankruptcy courts.

Alexandra made excellent use of my office hours. She asked clarifying questions about assignments and solicited feedback on her performance in class. During those times as well, Alexandra shared her life experiences which have shaped her personal mission and desire to study and work in the legal profession.

Alexandra is accomplished in three languages, Mandarin, Teochew, Cantonese in addition to English. She is the daughter of first-generation immigrants. She tells a particularly poignant story about how her mother's hope of attending high school was crushed because she lacked the money and because she was a girl. This story left an indelible impression on Alexandra and caused her to appreciate the importance of education and self-determination regardless of income, gender, and identity. She doesn't take her education or her opportunity to work in a field about which she is passionate for granted. She is motivated to serve and to be a part of a legal profession that strives to provide basic fairness for all.

Alexandra is highly motivated. I was impressed by the range of professional activities she has undertaken. Just to highlight a few of Alexandra's activities: Alexandra is an incoming summer Associate with Davis Polk Wardwell LLP for the summer of 2023. She will be representing pro se clients through the Appellate Litigation Clinic in the 2023-2024 academic year. She will be serving on the APALSA Executive Board. She is Professional Chair, Private Sector with APALSA. She will be coaching incoming 2L students in moot court competition in the Barristers' Counsel Appellate Advocacy Division and she is a member of OutLaw. These activities demonstrate Alexandra's interest in a range of important legal issues and the practice of law – all of which will contribute to her success as a law clerk and benefit her professional development.

Alexandra has received numerous awards throughout her law school career including: the 2022 William F. Leahy Moot Court Competition Best Brief Award, the CALI Award for Contracts and the Willard H. Pedrick Scholar honor.
Alexandra's would be an excellent law clerk. She has the necessary skills, breadth of experience during her law school career and demonstrated capacity to be successful. She is intellectually curious, self-motivated, and passionate about the law and the law's capacity to bring about justice. I have no doubt that Alexandra would make an extraordinary contribution to the court.

Alexandra's personal story is not only a testament to her strong abilities but demonstrates that she brings an important perspective and understanding to the law – a perspective that facilitates fairness in the law because our understanding of the law

Diann Rust-Tierney - dr967@georgetown.edu - (703) 201-1958

is informed by an understanding of the widest range of people and experiences coming before the law.

I predict Alexandra Li will be a stellar law clerk, and that she will pay forward every investment made in her. Alexandra Li has my highest recommendation, and I am a strong supporter of her application. I would be happy to discuss her work further at any time.

Thank you for considering her candidacy.

Very truly yours,

Diann Rust-Tierney

Diann Rust-Tierney - dr967@georgetown.edu - (703) 201-1958

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

With great enthusiasm, I write to recommend Alexandra Li (Alex) as a clerk in your chambers.

Alex sits close to the top ten percent of her class, and in a very large class as ours (550+), that is an extraordinary achievement. She was awarded “Best Brief” in our premier Leahy Moot Court competition. She is summering at Davis, Polk, Wardwell and, while working there, has continued to help me on various projects. Her hopes are to continue in litigation and work on complex multi-district cases. She is a first-generation student who grew up in a family where English was not spoken. She interned for a judge her first year summer, and found it to be a “wonderful” experience (her words).

I first met Alex when she volunteered to work on a major empirical project on statutory and constitutional interpretation. The work required rigor in coding and the capacity to understand conceptual nuance. I was particularly attracted to Alex’s resume because she had an undergraduate degree in finance and computer science. I knew she would not shy from numbers. Alex was always prompt in replying to my emails and was happy to spend hours on zoom walking through each number (I’m a bit of a perfectionist), and whether it was accurate given the conceptual boundaries of our coding. We worked seamlessly together and she worked very well with my other assistants. Alex is eager to please, generous with her time, and quite mature for her relative youth.

Finally, Alex’s background shows that she has drive and grit, two qualities essential for the best clerks and lawyers. Because her parents did not speak English at home, she taught herself the language through reading. She became her family’s translator, accompanying her parents to doctor’s appointments, government agencies, and banks. She has seen first-hand the difficulties of navigating the legal world, and she hopes to learn how to better serve the public. And, despite all the difficulties, and need for endless scholarships, she has pushed herself to excel.

In my experience, Alex has the temperament, intellectual capacity and drive to excel as a clerk. I recommend him to you without reservation.

Sincerely,

Victoria Nourse
Ralph V. Whitworth Professor of Law
Executive Director, Center for Congressional Studies

Victoria Nourse - vfn@law.georgetown.edu

ALEXANDRA M. LI
460 New York Ave NW, Washington, D.C. 20001 | (925) 989-6589 | aml404@georgetown.edu

WRITING SAMPLE

The attached writing sample is a brief submitted for the 2023 Federal Bar Association Thurgood Marshall Memorial Moot Court Competition. This is a brief for Respondents, two former felons challenging a state re-enfranchisement statute under the Equal Protection Clause of the Fourteenth Amendment and the Twenty-Fourth Amendment. The statute at issue requires "violent" felons to pay off all financial obligations related to their convictions before registering to vote. There is no equivalent obligation for "non-violent" felons. There is no other alternative to regain voting rights lost after felony convictions in the State of Marshall. Respondents and other indigent "violent" felons challenged the statute for depriving them re-enfranchisement on the basis of wealth.

This sample is my independent work. It omits the Table of Contents, Table of Authorities, Statement of Questions Presented, Statement of Jurisdiction, and the Twenty Fourth Amendment issue authored by my moot court partner. Applicable Supreme Court precedents apply a two-factor test to determine review standards for wealth classifications. Section I of the Argument analyzes the constitutionality of the challenged statute under strict scrutiny, and Section II analyzes the statute under rational basis review.

Team Number 2

No. 21-2089

_____

IN THE SUPREME COURT OF THE UNITED STATES

_____

ALLWRIGHT, ET AL.

Petitioners

v.

STOLL, ET AL.

Respondents

_____

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

_____

BRIEF FOR RESPONDENT

Counsel of Record

Alexandra M. Li

STATEMENT OF FACTS

2021 marked the watershed for re-enfranchisement of former felons in the State of Marshall. Previously, a felon in Marshall would be deprived of the right to vote upon conviction, with no avenue to regain such right. J.A. 1. A felon who knowingly voted in any election committed a third-degree felony, punishable by a fine up to $5,000 and/or a term of imprisonment up to five years. *Id.* at 2. In 2021, an overwhelming change in public opinion prompted the state legislature to pass Marshall House Bill 576 ("H.B. 576"). *Id.* H.B. 576 amends Marshall Stat. Ann. § 67-91 to permit former felons to vote in federal, state, and local elections, but only if they meet the Bill's requirements. J.A. 1. Marshall Stat. Ann. § 67-91 (2022).

Under H.B. 576, all felons must have "completed all terms of any imposed sentence, including any period of imprisonment, parole, probation, or supervised release of any sort," and submit to the State Board of Elections a notarized affidavit, a valid and complete application to register to vote, and a $50 processing fee. J.A. 5. These requirements, applicable to all felons, constitute the initial proposed bill passed by the Committee. *Id.* at 3. During House floor debates, Representative Dave Snider proposed an amendment to the initial bill, later codified as Marshall Stat. Ann. § 67-91(C)(2). *Id.* § 67-91(C)(2) imposes an additional financial obligation on felons convicted of "violent" crimes, defined as felonies with "an element of the use, attempted use, or threatened use of physical force against the person of another." *Id.* at 5. § 67-91. A violent felon must also have "completed or resolved all financial obligations, including any payment of restitution, fines, fees, or court costs, that are related to the conviction" to be eligibilie to vote. § 67-91(C). There is no equivalent obligation for "non-violent" felons. *Id.* § 67-91 is the only way for a convicted felon to regain the right to vote in the State of Marshall. J.A. 5. The law will take effect in time for the 2024 elections. *Id.* at 1.

During the floor debate, Representative Dave Snider expressed concerns that some constituents would accuse the legislature of "being soft on crime" if the initial bill were enacted. *Id.* at 3. He proposed adding § 67-91(C)(2) as a solution. *Id.* In his words, § 67-91(C)(2) makes violent felons "pay nickel and dime" and "jump through every single hoop" in order to regain the right to vote. *Id.* Conceding that making former felons pay did not have much to do with being tough on crime, Snider pointed out that § 67-91(C)(2) would nevertheless, give legislature "cover" from political backlash. *Id.* Representative Pinkerton objected to the amendment. *Id.* at 4. She reasoned that "even [Representative Snider] seems to recognize that [the amendment] makes no sense. . .What does a felon's ability to pay their court costs have to do with whether they should get the vote back? . . . All this is going to do is create uncertainty and prevent poor people from voting." *Id.* Four other representatives voiced their agreement with Representative Pinkerton. *Id.* § 67-91(C)(2) passed by a single vote.[1] *Id.*

Some former felons, namely, those convicted in Marshall state courts, can look up their outstanding financial obligations on a free central lookup website set up by the state. *Id.* at 6. The website does not provide information to felons convicted of crimes in federal or non-Marshall state courts. *Id*. Of the 500,000 felons living in Marshall who have completed their imposed sentences, 79% owe some form of financial obligations and 68% were indigent at the time of their trial. *Id.* Neither does the website classify felonies as "violent" or "non-violent." *Id.* 80% of felons and former felons are convicted of Marshall crimes with no binding precedent interpreting whether the felony is "violent" as defined by § 67-91. *Id.* Former felons convicted of undisputedly "violent" felonies are 15 times more likely to be indigent post-release than former felons convicted of "white-collar", or non-violent offenses. *Id.*

[1] The amendment passed 75 to 74, with one abstention in the House. J.A. 4.

Respondents Michael Stoll and Kelly Porter are former felons who hope to regain their right to vote under H.B. 576. *Id.* at 7. Mr. Stoll was convicted for having served as a getaway driver in an armed robbery. *Id.* This is a felony conviction and he is therefore subject to § 67-91(C)(2)'s financial obligations. *Id.* at 5, 7. Mr. Stoll has completed his term of imprisonment and probation, and is excluded from voting solely due to his indigency. *Id.* at 7. He is unable to pay either the $1,200 in outstanding financial obligations related to his conviction, or the $50 processing fee. *Id.* at 7. Ms. Porter is a former felon convicted of wire fraud. *Id.* She has completed all terms of her imposed sentence, with $200,000 in outstanding restitution. *Id.* Respondents filed suit in the District Court of Marshall, challenging § 67-91(C)(2) and § 67-91's requirement to pay a processing fee. *Id.* at 1. The District Court of Marshall granted summary judgment for Appellants on February 22, 2022, and the Thirteenth Circuit reversed on appeal on July 1, 2022. *Id.* at 10, 16. This Court granted certiorari on November 4, 2022.

ARGUMENT

I. Under strict scrutiny, Marshall Stat. Ann. § 67-91(C)(2) violates Equal Protection because it impermissibly discriminates on the basis of wealth.

This Court should strike down § 67-91(C)(2) because it fails strict scrutiny. Unlike *Jones*, financial obligations related to convictions are *not* a part of felons' sentences in Marshall. *Jones v. Governor of Fla.*, 975 F.3d 1016, 1026 (11d Cir. 2020). § 67-91. Therefore, § 67-91(C)(2) creates two classes of felons: those who have completed their imposed sentences and are able to pay their financial obligations, and those who have completed their imposed sentences but unable to pay. Because voting rights are unavailable to the latter due to their indigency, § 67-91(C)(2) creates a class that discriminates on wealth in the availability of voting rights.

There are two requirements to apply strict scrutiny to wealth classifications: 1) that the class discriminated against is completely unable to pay for a desired benefit; and 2) that as a result,

the class is absolutely deprived of the opportunity to enjoy said benefit. *Harper v. Va. Bd. of Elections*, 383 U.S. 667, 668 (1966). *Bearden v. Ga.*, 461 U.S. 660, 667 (1983). *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973). Here, § 67-91(C)(2) satisfies both requirements. Stoll is indigent and completely unable to pay his outstanding financial obligations. As a result, Stoll is completely deprived of the right to vote because § 67-91(C) is the only avenue of re-enfranchisement for felons in Marshall. J.A. 5. It follows that this Court should apply strict scrutiny to § 67-91(C)(2). As conceded by the State of Marshall at oral argument, § 67-91(C)(2) fails strict scrutiny and violates the Equal Protection Clause. J.A. 13.

A. § 67-91(C)(2) creates a class that discriminates on the basis of wealth, not the completion of imposed sentences.

The district court erred in concluding that the statute at issue does not discriminate on wealth. J.A. 8. The court compared the provision at issue to "an analogous Florida law" in *Jones*, which was in fact crucially different. *Id.* § 67-91(C)(2) discriminates on wealth for two reasons: financial obligations are not part of the imposed sentences, and felons cannot reasonably ascertain whether they must pay off financial obligations before voting. § 67-91.

The textual distinction of the two statutes shows that § 67-91(C)(2) discriminates on wealth. The *Jones* statute defines imposed sentences to encompass "imprisonment, probation, restitution, fines, fees, and costs." 975 F.3d at 1026. For convicted felons who have not paid their restitution, fines, fees, and costs, failure to complete their imposed sentences, not wealth, bars their eligibility to vote. *Id.* at 1030 ("The only classification at issue is between felons who have completed all terms of their sentences, including financial terms, and those who have not. This classification does not turn on membership in a suspect class.").

However, the same conclusion does not follow here because § 67-91(C)(2) does not define financial obligations as part of the imposed sentence. § 67-91(C). Violent felons in Marshall are

eligible to vote on two conditions:

> (1) completed all terms of any imposed sentence, including any period of imprisonment, parole, probation, or supervised release of any sort; *and*
> (2) completed or resolved all financial obligations, including any payment of restitution, fines, fees, or court costs, that are related to the conviction in compliance with the court order setting the obligations.

§ 67-91(C).

Resolving financial obligations is not a part of completing imposed sentences, but rather a distinct and separate requirement altogether. *Id.* This distinction is meaningful because the two statutes create different classes. The *Jones* statute divides convicted felons into classes of those who have completed their imposed sentences, and those who have not. 975 F.3d at 1030. Here, however, § 67-91(C)(2) divides convicted felons into classes of those who have completed their sentences and can afford to pay, and those who have completed their sentences but cannot afford to pay their financial obligations. § 67-91(C)(2) creates an indigent class that does not exist under the *Jones* statute. Among felons who have completed their imposed sentences, § 67-91(C)(2) bars only the indigent from voting, while granting voting rights to those who can afford to pay. The district court erred in finding no wealth classification.

Aside from the statutory text, § 67-91(C)(2) also burdens the indigent because it is unreasonably difficult to determine one's obligations under the statute. This directly undercuts the district court's conclusion that the statute discriminates on the nature of conviction. J.A. 8. Felons in Marshall, violent or non-violent alike, cannot reasonably ascertain whether they have to pay their financial obligations before voting. To begin, felons convicted in a non-Marshall state court, or a federal court, have no access to the website tracking their outstanding financial obligations. *Id*. Although felons convicted in Marshall state courts *could* look up the website for outstanding balances, there is no information on whether users are violent or non-violent felons. *Id*. To put this

lack of clarity in perspective, 80% of felons were convicted of felonies with no binding precedent interpreting whether they are "violent" under § 67-91. J.A. 6. Furthermore, an ineligible felon who knowingly votes in an election could be prosecuted for "a felony in the third degree, punishable by a fine of no more than $5,000 and/or a term of imprisonment not exceeding 5 years." J.A. 2.

The lack of notice, combined with the steep price of violation, present a Hobson's choice to an overwhelming majority of felons. Monied felons could simply pay off their financial obligations and avoid the risk of prosecution, in the event they did commit violent felonies. However, indigent felons, violent or non-violent alike, are much more likely to not vote: they cannot afford to pay if they are indeed violent felons. The uncertainty and vagueness of the current scheme also falls heavily on indigents, who possess few resources and struggle with subsistence.

§ 67-91(C)(2) thus burdens indigent felons, regardless of the nature of felonies convicted. It discriminates on the basis of wealth, not the completion of imposed sentences.

B. This Court should apply strict scrutiny to § 67-91(C)(2) because it satisfies the *Rodriguez* factors requisite for the enumerated exception.

This Court should apply strict scrutiny to § 67-91(C)(2). While rational basis typically applies to wealth classifications, § 67-91(C)(2) fits squarely within the exception for strict scrutiny.

The *Harper/Bearden* exception applies strict scrutiny to Equal Protection inquiries of wealth classifications. *Harper*, 383 U.S. at 668. *Bearden*, 461 U.S. at 667. In *Harper*, the Court struck down a state constitutional provision that preconditioned voting on the payment of a $1.50 poll tax. 383 U.S. at 670. The Court concluded that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Id.* at 666. The *Harper* Court explained that wealth classifications are subject to strict scrutiny because "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." *Id.* at 668. The *Bearden* Court held that a

sentencing court cannot revoke a defendant's probation for his inability to pay fines and restitution. 461 U.S. at 667. The Court again stated that Equal Protection inquiries of wealth classifications "cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry. . ." *Id.*

The Court subsequently applied strict scrutiny to a number of wealth classifications that barred indigents from having access to state-created rights. *Griffin v. Ill.*, 351 U.S. 12, 39 (1956) (invalidating state law that prevented indigent criminal defendants from obtaining a court transcript); *Williams v. Ill.*, 399 U.S. 235, 244 (1970) (striking down criminal penalties incarcerating indigent defendants who were unable to pay fines); *Bullock v. Carter*, 405 U.S. 134, 149 (1972) (invalidating election filing fee requirements for indigent candidates); *Douglas v. Cal.*, 372 U.S. 353, 366-67 (1963) (holding indigent defendants have a right to court-appointed counsel on direct appeal). *See also Gardner v. Cal.*, 393 U.S. 367 (1969); *Draper v. Wash.*, 372 U.S. 487 (1963); *Tate v. Short*, 401 U.S. 395 (1971). These cases, along with *Harper* and *Bearden*, create an exception in wealth classifications. Courts apply rational basis review to wealth classifications without more. *Dandridge v. Williams*, 397 U.S. 471, 483 (1970). Certain wealth classifications that fall within the *Harper*/*Bearden* exception are, however, subject to strict scrutiny. *Harper*, 383 U.S. at 668. *Bearden*, 461 U.S. at 667.

This Court should extend the exception and apply strict scrutiny here. Under *Rodriguez*, strict scrutiny applies to wealth classifications when the class of individuals discriminated against possesses "two distinguishing characters." *Rodriguez*, 411 U.S. at 20 (1973). Plaintiffs must be "completely unable to pay" due to their indigency. *Id.* And as a consequence of their inability to pay, plaintiffs must be absolutely deprived of the enjoyment of a desired benefit. *Id.* Both characteristics are satisfied here.

In *Rodriguez,* the Court sustained an Equal Protection challenge against a state funding program. *Id.* at 62. The program funded public schools pro rata with the size of property tax revenues in each school district. *Id.* at 9-10. The plaintiffs were school children residing in school districts with lower property values, and they alleged wealth discrimination. *Id.* at 4-5. The *Rodriguez* Court declined to extend the *Harper/Bearden* exceptions because neither characteristic was satisfied. *Id.* at 55. The Court explained that while there were wealth disparities between school districts, not all of the poorest students lived in the poorest districts. *Id.* at 23. So even though plaintiffs were *relatively* poor compared to the advantaged class, they were not "completely unable to pay." *Id. Rodriguez* was therefore distinct from cases within the *Harper/Bearden* exception, where the disadvantaged classes were "composed only of persons who were totally unable to pay the demanded sum." *Id.* at 22. ("Those cases do not touch on the question whether Equal Protection is denied to persons with relatively less money on whom designated fines impose heavier burdens."). Additionally, while the plaintiffs were perhaps receiving education of lesser quality, they were not absolutely deprived of public education. *Id.* at 23-24. Similarly, cases within the exceptions, i.e., *Griffin*, *Gardner, Draper, Douglas*, *Williams*, and *Tate* involved plaintiffs who, due to their indigency, had no other reasonable alternatives to access court transcripts, obtain legal representation, or pay fines. *Rodriguez,* 411 U.S. at 21-22.

In the present case, both the *Rodriguez* characteristics are satisfied. Like *Griffin*, *Gardner, Draper, Douglas, Williams*, and *Tate*, the Plaintiff class here consists "only of persons who were totally unable to pay the demanded sum," and they have no reasonable alternatives to re-enfranchisement. *Id.* at 22. Stoll is indigent and completely unable to pay $1,200 of outstanding financial obligation. J.A. 6. He brought this case on behalf on himself, and hundreds of thousands of indigent felons barred from voting. *Id.* The district court found that out of more than 500,000

felons in Marshall who have completed their imposed sentence, over 395,000 (79%) have outstanding financial obligations, and over 340,000 (68%) are indigents who could not afford legal representation even when their liberty was at stake. *Id.* Unlike *Rodriguez,* relative wealth is not implicated here. J.A. 6. While all of the *Rodriguez* plaintiffs were relatively poor, some could in fact afford to live in a different school district and enjoy a better public education. 411 U.S. at 20. The Plaintiffs here do not merely struggle to pay, or choose not to, they are simply unable to.

As a consequence of their indigency, Stoll and other Plaintiffs are absolutely deprived of the benefit of re-enfranchisement. At conviction, felons are deprived of the right to vote per Marshall state law. J.A. 6. § 67-91 creates and grants the right to vote to former felons, and it is in fact *the only avenue* to regain voting rights lost due to a felony conviction. *Id.* at 5. § 67-91. This is also a second crucial distinction from *Jones*, where indigent felons had multiple alternative avenues to re-enfranchisement. 975 F.3d at 1056. In *Jones*, indigent felons could seek executive clemency, termination of financial obligation by a payee, conversion of financial obligation to community service hours, or judicial modification of the original sentencing order. *Id.* In contrast, indigent felons in Marshall who cannot afford to pay their financial obligations are completely barred from re-enfranchisement.

Having the opportunity to enjoy voting before conviction is not an alternative avenue. The benefit at issue is re-enfranchisement, not voting. Under *Richardson v. Ramirez,* the right to vote and re-enfranchisement are inherently different as a matter of the Constitution. 418 U.S. 24, 54 (1974). Voting is a fundamental interest, whereas re-enfranchisement is not. *Id.* (explaining that § 2 of the Fourteenth Amendment affirmatively sanctions the exclusion of felons from voting). *Richardson* is settled law: no other Supreme Court precedents contradict or qualify its holding. To say the second *Rodriguez* factor is not satisfied because all felons could vote pre-conviction would